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U. S. DEPARTMENT OF AGRICULTURE
OFFICE OF THE SOLICITOR

FRANCIS G. CAFFEY, SOLICITOR

FOOD AND DRUGS ACT

JUNE 30, 1906

AND AMENDMENTS OF AUGUST 23, 1912

AND MARCH 3, 1913

WITH THE

RULES AND REGULATIONS FOR THE ENFORCEMENT OF
THE ACT, FOOD INSPECTION DECISIONS, SELECTED
COURT DECISIONS, DIGEST OF DECISIONS,
OPINIONS OF THE ATTORNEY GENERAL

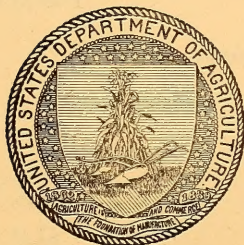
AND

APPENDIX

Compiled by

C. A. GWINN

UNDER THE DIRECTION OF THE SOLICITOR



WASHINGTON
GOVERNMENT PRINTING OFFICE
1914

LETTER OF TRANSMITTAL.

U. S. DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SOLICITOR,
Washington, D. C., January 29, 1914.

SIR: I recommend the publication of the compilation transmitted herewith of the Food and Drugs Act of June 30, 1906, the amendments thereto of August 23, 1912, and March 3, 1913, rules and regulations for the enforcement of the act, Food Inspection Decisions, selected court decisions, digest of decisions, opinions of the Attorneys General, legislative history of the act and amendments, and other matters of interest pertaining to the act.

No attempt has been made to reconcile conflicting court decisions or to inject into the work the views of the administrative officers charged with the enforcement of the act, except as they have been expressed in regulations and Food Inspection Decisions.

It has been considered impracticable and undesirable to refer to all of the approximately 3,000 cases under the act terminated in the courts. Only those in which there is an opinion or a charge to the jury are included.

This compilation was prepared under my direction by C. A. Gwinn, a law clerk of this office.

It is believed that a publication of this character will be of material assistance in the enforcement of the act.

Respectfully,

FRANCIS G. CAFFEY, *Solicitor.*

Hon. D. F. HOUSTON,
Secretary of Agriculture.



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FEDERAL FOOD AND DRUGS ACT AND DECISIONS.

THE STATUTES.

THE FOOD AND DRUGS ACT, JUNE 30, 1906.¹

AN ACT For preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be unlawful for any person to manufacture within any Territory or the District of Columbia any article of food or drug which is adulterated or misbranded, within the meaning of this Act; and any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor, and for each offense shall, upon conviction thereof, be fined not to exceed five hundred dollars or shall be sentenced to one year's imprisonment, or both such fine and imprisonment, in the discretion of the court, and for each subsequent offense and conviction thereof shall be fined not less than one thousand dollars or sentenced to one year's imprisonment, or both such fine and imprisonment, in the discretion of the court.

SEC. 2. That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this Act, is hereby prohibited; and any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this Act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor, and for such offense be fined not exceeding

¹ 34 Stat. 768; U. S. Comp. Stat. 1901, Supp. 1911, p. 1354.

two hundred dollars for the first offense, and upon conviction for each subsequent offense not exceeding three hundred dollars or be imprisoned not exceeding one year, or both, in the discretion of the court: *Provided*, That no article shall be deemed misbranded or adulterated within the provisions of this Act when intended for export to any foreign country and prepared or packed according to the specifications or directions of the foreign purchaser when no substance is used in the preparation or packing thereof in conflict with the laws of the foreign country to which said article is intended to be shipped; but if said article shall be in fact sold or offered for sale for domestic use or consumption, then this proviso shall not exempt said article from the operation of any of the other provisions of this Act.

SEC. 3. That the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this Act, including the collection and examination of specimens of foods and drugs manufactured or offered for sale in the District of Columbia, or in any Territory of the United States, or which shall be offered for sale in unbroken packages in any State other than that in which they shall have been respectively manufactured or produced, or which shall be received from any foreign country, or intended for shipment to any foreign country, or which may be submitted for examination by the chief health, food, or drug officer of any State, Territory, or the District of Columbia, or at any domestic or foreign port through which such product is offered for interstate commerce, or for export or import between the United States and any foreign port or country.

SEC. 4. That the examinations of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of such Bureau, for the purpose of determining from such examinations whether such articles are adulterated or misbranded within the meaning of this Act; and if it shall appear from any such examination that any of such specimens is adulterated or misbranded within the meaning of this Act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such sample was obtained. Any party so notified shall be given an opportunity to be heard, under such rules and regulations as may be prescribed as aforesaid, and if it appears that any of the provisions of this Act have been violated by such party, then the Secretary of Agriculture shall at once certify the facts to the proper United States district attorney, with a copy of the results of the analysis or the examination of such article duly authenticated by the analyst or officer making such examination, under the oath of such officer. After judgment of the court, notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid.

SEC. 5. That it shall be the duty of each district attorney to whom the Secretary of Agriculture shall report any violation of this Act, or to whom any health or food or drug officer or agent of any State, Territory, or the District of Columbia shall present satisfactory evidence of any such violation, to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States,

without delay, for the enforcement of the penalties as in such case herein provided.

SEC. 6. That the term "drug" as used in this Act, shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals. The term "food," as used herein, shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound.

SEC. 7. That for the purposes of this Act an article shall be deemed to be adulterated:

In case of drugs:

First. If, when a drug is sold under or by a name recognized in the United States Pharmacopœia or National Formulary, it differs from the standard of strength, quality, or purity, as determined by the test laid down in the United States Pharmacopœia or National Formulary official at the time of investigation: *Provided*, That no drug defined in the United States Pharmacopœia or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality, or purity be plainly stated upon the bottle, box, or other container thereof although the standard may differ from that determined by the test laid down in the United States Pharmacopœia or National Formulary.

Second. If its strength or purity fall below the professed standard or quality under which it is sold.

In the case of confectionery:

If it contain terra alba, barytes, tale, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound or narcotic drug.

In the case of food:

First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

Second. If any substance has been substituted wholly or in part for the article.

Third. If any valuable constituent of the article has been wholly or in part abstracted.

Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health: *Provided*, That when in the preparation of food products for shipment they are preserved by any external application applied in such manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the covering or the package, the provisions of this Act shall be construed as applying only when said products are ready for consumption.

Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter.

SEC. 8.¹ That the term "misbranded," as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

That for the purposes of this Act an article shall also be deemed to be misbranded:

In case of drugs:

First. If it be an imitation of or offered for sale under the name of another article.

Second. If the contents of the package as originally put up shall have been removed, in whole or in part, and other contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein.

In the case of food:

First. If it be an imitation of or offered for sale under the distinctive name of another article.

Second. If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of any morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any of such substances contained therein.

Third.² If in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package.

Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word "compound," "imitation," or "blend," as the case may

¹ See amendment of Aug. 23, 1912, p. 14, *post*.

² See amendment of Mar. 3, 1913, p. 15, *post*.

be, is plainly stated on the package in which it is offered for sale: *Provided*, That the term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only: *And provided further*, That nothing in this Act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding.

SEC. 9. That no dealer shall be prosecuted under the provisions of this Act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this Act, designating it. Said guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines and other penalties which would attach, in due course, to the dealer under the provisions of this Act.

SEC. 10. That any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this Act, and is being transported from one State, Territory, District, or insular possession to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, or if it be sold or offered for sale in the District of Columbia or the Territories, or insular possessions of the United States, or if it be imported from a foreign country for sale, or if it is intended for export to a foreign country, shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. And if such article is condemned as being adulterated or misbranded, or of a poisonous or deleterious character, within the meaning of this Act, the same shall be disposed of by destruction or sale, as the said court may direct, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States, but such goods shall not be sold in any jurisdiction contrary to the provisions of this Act or the laws of that jurisdiction: *Provided, however*, That upon the payment of the costs of such libel proceedings and the execution and delivery of a good and sufficient bond to the effect that such articles shall not be sold or otherwise disposed of contrary to the provisions of this Act, or the laws of any State, Territory, District, or insular possession, the court may by order direct that such articles be delivered to the owner thereof. The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States.

SEC. 11. The Secretary of the Treasury shall deliver to the Secretary of Agriculture, upon his request from time to time, samples of foods and drugs which are being imported into the United States or offered for import, giving notice thereof to the owner or consignee,

who may appear before the Secretary of Agriculture, and have the right to introduce testimony, and if it appear from the examination of such samples that any article of food or drug offered to be imported into the United States is adulterated or misbranded within the meaning of this Act, or is otherwise dangerous to the health of the people of the United States, or is of a kind forbidden entry into, or forbidden to be sold or restricted in sale in the country in which it is made or from which it is exported, or is otherwise falsely labeled in any respect, the said article shall be refused admission, and the Secretary of the Treasury shall refuse delivery to the consignee and shall cause the destruction of any goods refused delivery which shall not be exported by the consignee within three months from the date of notice of such refusal under such regulations as the Secretary of the Treasury may prescribe: *Provided*, That the Secretary of the Treasury may deliver to the consignee such goods pending examination and decision in the matter on execution of a penal bond for the amount of the full invoice value of such goods, together with the duty thereon, and on refusal to return such goods for any cause to the custody of the Secretary of the Treasury, when demanded, for the purpose of excluding them from the country, or for any other purpose, said consignee shall forfeit the full amount of the bond: *And provided further*, That all charges for storage, cartage, and labor on goods which are refused admission or delivery shall be paid by the owner or consignee, and in default of such payment shall constitute a lien against any future importation made by such owner or consignee.

SEC. 12. That the term "Territory" as used in this Act shall include the insular possessions of the United States. The word "person" as used in this Act shall be construed to import both the plural and the singular, as the case demands, and shall include corporations, companies, societies and associations. When construing and enforcing the provisions of this Act, the act, omission, or failure of any officer, agent, or other person acting for or employed by any corporation, company, society, or association, within the scope of his employment or office, shall in every case be also deemed to be the act, omission, or failure of such corporation, company, society, or association as well as that of the person.

SEC. 13. That this Act shall be in force and effect from and after the first day of January, nineteen hundred and seven.

Approved June 30, 1906.

SHERLEY AMENDMENT.¹

AN ACT To amend section eight of the Food and Drugs Act approved June thirtieth, nineteen hundred and six.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That that part of section eight of the Food and Drugs Act of June thirtieth, nineteen hundred and six, defining what shall be misbranding in the case of drugs, be, and the same is hereby, amended by adding thereto a third paragraph to read as follows:

¹ 37 Stat., 416, C. 352.

"If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent."

So that the said part of said section eight shall read as follows:

"SEC. 8. That the term 'misbranded,' as used herein, shall apply to all drugs or articles of food or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

"That for the purposes of this Act an article shall also be deemed to be misbranded. In case of drugs:

"First. If it be an imitation of or offered for sale under the name of another article.

"Second. If the contents of the package as originally put up shall have been removed, in whole or in part, and other contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein.

"Third. If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent."

Approved, August 23, 1912.

GOULD AMENDMENT.¹

AN ACT To amend section eight of an Act entitled "An Act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes," approved June thirtieth, nineteen hundred and six.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section eight of an Act entitled "An Act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes," approved June thirtieth, nineteen hundred and six, be, and the same is hereby, amended by striking out the words "Third. If in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package," and inserting in lieu thereof the following:

"Third. If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count: *Provided, however,*

That reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of Section three of this Act.¹

SEC. 2. That this Act shall take effect and be in force from and after its passage: *Provided, however,* That no penalty of fine, imprisonment, or confiscation shall be enforced for any violation of its provisions as to domestic products prepared or foreign products imported prior to eighteen months after its passage.

Approved, March 3, 1913.

¹ See regulations published in F. I. D. 154, May 11, 1914.

RULES AND REGULATIONS.¹

GENERAL.

REGULATION 1. SHORT TITLE OF THE ACT.

The act, "For preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines and liquors, and for regulating traffic therein, and for other purposes," approved June 30, 1906, shall be known and referred to as "The Food and Drugs Act, June 30, 1906."

REGULATION 2. ORIGINAL UNBROKEN PACKAGE.²

(Section 2³.)

The term "original unbroken package" as used in this act is the original package, carton, case, can, box, barrel, bottle, phial, or other receptacle put up by the manufacturer, to which the label is attached, or which may be suitable for the attachment of a label, making one complete package of the food or drug article. The original package contemplated includes both the wholesale and the retail package.⁴

REGULATION 3. COLLECTION OF SAMPLES.⁵

(Section 4.)

Samples of unbroken packages shall be collected only by authorized agents of the Department of Agriculture, or by the health, food, or drug officer of any State, Territory, or the District of Columbia, when commissioned by the Secretary of Agriculture for this purpose.

Samples may be purchased in the open market, and, if in bulk, the marks, brands, or tags upon the package, carton, container, wrapper, or accompanying printed or written matter shall be noted. The collector shall also note the names of the vendor and agent through whom the sale was actually made, together with the date of the purchase. The collectors shall purchase representative samples.

¹ Under date of Oct. 17, 1906, 40 Rules and Regulations for the Enforcement of the Food and Drugs Act, June 30, 1906, were adopted by the Secretaries of the Treasury, Agriculture, and Commerce and Labor by virtue of authority conferred in section 3 of the act. Since that time eight regulations, Nos. 3, 5, 9, 15, 17, 19, 28, and 34, have been amended, as shown in the text; and one regulation, No. 39, has been revoked by F. I. D. 151. The initial letters "F. I. D.," as used herein, mean Food Inspection Decision.

² See also F. I. D. 86.

³ The sections mentioned after the titles of these regulations refer to sections of the Food and Drugs Act, June 30, 1906.

⁴ See *United States v. Five Boxes of Asafœtida*, p. 318, *post*; *United States v. 65 Casks of Liquid Extracts*, p. 199, *post*; *United States v. 300 Cases of Mapleine*, p. 190, *post*; *United States v. Two Barrels of Desiccated Eggs*, p. 388, *post*; *United States v. The Dr. J. L. Stephens Co.*, p. 466, *post*; *Hipolite Egg Co. v. United States*, p. 378, *post*; and *McDermott et al. v. Wisconsin*, p. 629, *post*.

⁵ As amended by F. I. D. 79, Oct. 8, 1907.

A sample taken from bulk goods shall be divided into three parts, and each shall be labeled with the indentifying marks.

If a package be less than 4 pounds, or in volume less than 2 quarts, three packages shall be purchased, when practicable, and the marks and tags upon each noted as above. When three samples are purchased, one sample shall be delivered to the Bureau of Chemistry or to such chemist or examiner as may be designated by the Secretary of Agriculture; the second and third samples shall be held under seal by the Secretary of Agriculture, who, upon request, shall deliver one of such samples to the party from whom purchased or to the party guaranteeing such merchandise.

When it is impracticable to collect three samples, or to divide the sample or samples, the order of delivery outlined above shall obtain, and in case there is a second sample the Secretary of Agriculture may, at his discretion, deliver such sample to parties interested.

All samples shall be sealed by the collector with a seal provided for the purpose.

REGULATION 4. METHODS OF ANALYSIS.¹

(Section 4.)

Unless otherwise directed by the Secretary of Agriculture, the methods of analysis employed shall be those prescribed by the Association of Official Agricultural Chemists and the United States Pharmacopœia.

REGULATION 5. HEARINGS.²

(Section 4.)

(a) When the examination or analysis shows that samples are adulterated or misbranded within the meaning of this act notice of that fact shall be given in every case to the party or parties against whom prosecution lies under this act for the shipment or manufacture or sale of the particular product and such other interested parties as the Secretary of Agriculture may direct, and a date shall be fixed at which such party or parties may be heard before the Secretary of Agriculture or such other person as he may direct. The hearings shall be had at places designated by the Secretary of Agriculture most convenient for all parties concerned. These hearings shall be private and confined to questions of fact. The parties interested therein may appear in person or by attorney and may submit oral or written evidence to show any fault or error in the findings of the analyst or examiner. Interested parties may present proper interrogatories to analysts, to be submitted to and propounded by the Secretary of Agriculture or the officer conducting the hearing. Such privilege, however, shall not include the right of cross-examination. The Secretary of Agriculture may order a reexamination of the sample or have new samples drawn for further examination.

(b) If, after hearings held, it appears that a violation of the act has been committed, the Secretary of Agriculture shall give notice to the proper United States attorney.

(c) Any health, food, or drug officer or agent of any State, Territory, or the District of Columbia who shall obtain satisfactory evi-

¹ See *United States v. 100 Barrels of Vinegar*, p. 448, *post*.

² As amended by F. I. D. 130, Jan. 18, 1911.

dence of any violation of the Food and Drugs Act, June 30, 1906, as provided by section 5 thereof, shall first submit the same to the Secretary of Agriculture in order that he may give notice and fix dates for hearings to the proper parties.

REGULATION 6. PUBLICATION.

(Section 4.)

(a) When a judgment of the court shall have been rendered there may be a publication of the findings of the examiner or analyst, together with the findings of the court.

(b) This publication may be made in the form of circulars, notices, or bulletins, as the Secretary of Agriculture may direct, not less than thirty days after judgment.

(c) If an appeal be taken from the judgment of the court before such publication, notice of the appeal shall accompany the publication.

REGULATION 7. STANDARDS FOR DRUGS.

(Section 7.)

(a) A drug bearing a name recognized in the United States Pharmacopœia or National Formulary, without any further statement respecting its character, shall be required to conform in strength, quality, and purity to the standards prescribed or indicated for a drug of the same name recognized in the United States Pharmacopœia or National Formulary, official at the time.¹

(b) A drug bearing a name recognized in the United States Pharmacopœia or National Formulary, and branded to show a different standard of strength, quality, or purity, shall not be regarded as adulterated if it conforms to its declared standard.

REGULATION 8. FORMULAS—PROPRIETARY FOODS.

(Section 8, last paragraph.)

(a) Manufacturers of proprietary foods are only required to state upon the label the names and percentages of the materials used, in so far as the Secretary of Agriculture may find this to be necessary to secure freedom from adulteration and misbranding.

(b) The factories in which proprietary foods are made shall be open at all reasonable times to the inspection provided for in regulation 16.

REGULATION 9. FORM OF GUARANTY.²

(Section 9.)

(a) No dealer in food or drug products will be liable to prosecution if he can establish that the goods were sold under a guaranty by the wholesaler, manufacturer, jobber, dealer, or other party residing in the United States from whom purchased.³

(b) A general guaranty may be filed with the Secretary of Agriculture by the manufacturer or dealer and be given a serial number,

¹ See *United States v. Lehn & Fink*, p. 384, *post*.

² As amended by F. I. D. 99, Dec. 8, 1908. For information concerning the use of guaranties under section 9 of the Food and Drugs Act, see F. I. D. Nos. 40, 62, 70, 72, 83, 96, and 99. See also F. I. D. 153, May 5, 1914, amending this regulation.

³ See *United States v. Heinle Specialty Co.*, p. 236, *post*.

which number shall appear on each and every package of goods sold under such guaranty with the words "Guaranteed by [insert name of guarantor] under the Food and Drugs Act, June 30, 1906."

(c) The following form of guaranty is suggested:

I (we) the undersigned do hereby guarantee that the articles of foods or drugs manufactured, packed, distributed, or sold by me (us) [specifying the same as fully as possible] are not adulterated or misbranded within the meaning of the Food and Drugs Act, June 30, 1906.

(Signed in ink.)

[Name and place of business of wholesaler, dealer, manufacturer, jobber, or other party.]

(d) If the guaranty be not filed with the Secretary of Agriculture as above, it should identify and be attached to the bill of sale, invoice, bill of lading, or other schedule giving the names and quantities of the articles sold.

ADULTERATION.

REGULATION 10. CONFECTIONERY.

(Section 7.)

(a) Mineral substances of all kinds (except as provided in regulation 15) are specifically forbidden in confectionery whether they be poisonous or not.¹

(b) Only harmless colors or flavors shall be added to confectionery.

(c) The term "narcotic drugs" includes all the drugs mentioned in section 8, Food and Drugs Act, June 30, 1906, relating to foods, their derivatives and preparations, and all other drugs of a narcotic nature.

REGULATION 11. SUBSTANCES MIXED AND PACKED WITH FOODS.

(Section 7, under "Foods.")

No substance may be mixed or packed with a food product which will reduce or lower its quality or strength. Not excluded under this provision are substances properly used in the preparation of food products for clarification or refining, and eliminated in the further process of manufacture.

REGULATION 12. COLORING, POWDERING, COATING, AND STAINING.

(Section 7, under "Foods.")

(a) Only harmless colors may be used in food products.

(b) The reduction of a substance to a powder to conceal inferiority in character is prohibited.

(c) The term "powdered" means the application of any powdered substance to the exterior portion of articles of food, or the reduction of a substance to a powder.

(d) The term "coated" means the application of any substance to the exterior portion of a food product.

¹ But see *French Silver Dragée Co. v. United States*, p. 276, *post*.

(e) The term "stain" includes any change produced by the addition of any substance to the exterior portion of foods which in any way alters their natural tint.

REGULATION 13. NATURAL POISONOUS OR DELETERIOUS INGREDIENTS.

(Section 7, paragraph 5, under "Foods.")

Any food product which contains naturally a poisonous or deleterious ingredient does not come within the provisions of the Food and Drugs Act, June 30, 1906, except when the presence of such ingredient is due to filth, putrescence, or decomposition.

REGULATION 14. EXTERNAL APPLICATION OF PRESERVATIVES.

(Section 7, paragraph 5, under "Foods," proviso.)

(a) Poisonous or deleterious preservatives shall only be applied externally, and they and the food products shall be of a character which shall not permit the permeation of any of the preservative to the interior, or any portion of the interior, of the product.

(b) When these products are ready for consumption, if any portion of the added preservative shall have penetrated the food product, then the proviso of section 7, paragraph 5, under "Foods," shall not obtain, and such food products shall then be subject to the regulations for food products in general.

(c) The preservative applied must be of such a character that, until removed, the food products are inedible.

REGULATION 15. WHOLESOMENESS OF COLORS AND PRESERVATIVES.¹

(Section 7, paragraph 5, under "Foods.")

(a) Respecting the wholesomeness of colors, preservatives, and other substances which are added to foods, the Secretary of Agriculture shall determine from chemical or other examination, under the authority of the agricultural appropriation act, Public 382, approved June 30, 1906, the names of those substances which are permitted or inhibited in food products; and such findings, when approved by the Secretary of the Treasury and the Secretary of Commerce and Labor, shall become a part of these regulations.

(b) The Secretary of Agriculture shall determine from time to time, in accordance with the authority conferred by the agricultural appropriation act, Public 382, approved June 30, 1906, the principles which shall guide the use of colors, preservatives, and other substances added to foods; and when concurred in by the Secretary of the Treasury and the Secretary of Commerce and Labor, the principles so established shall become a part of these regulations.

(c) It having been determined that benzoate of soda mixed with food is not deleterious or poisonous and is not injurious to health, no objection will be raised under the food and drugs act to the use in food of benzoate of soda, provided that each container or package of such food is plainly labeled to show the presence and amount of benzoate of soda. Food Inspection Decisions 76 and 89 are amended accordingly.

¹ As amended to accord with F. I. D. 104. See also F. I. D. 76, 89, 92, 101, 102, 135, and 138 for rulings on colors and preservatives.

(*d*) It having been determined that saccharin mixed with food is an added poisonous and deleterious ingredient such as is contemplated by the act, and also that the substitution of saccharin for sugar in foods reduces and lowers their quality, the Secretary of Agriculture will regard as adulterated under the food and drugs act foods containing saccharin which, on and after April 1, 1912, are manufactured or offered for sale in the District of Columbia or Territories or shipped in interstate or foreign commerce, or offered for importation into the United States. (F. I. D. 135, 138, and 142, dated April 26 and June 20, 1911, and March 1, 1912, respectively.)¹

REGULATION 16. CHARACTER OF THE RAW MATERIALS.

(Section 7, paragraph 1, under "Drugs;" paragraph 6, under "Foods.")

(*a*) The Secretary of Agriculture, when he deems it necessary, shall examine the raw materials used in the manufacture of food and drug products, and determine whether any filthy, decomposed, or putrid substance is used in their preparation.

(*b*) The Secretary of Agriculture shall make such inspections as often as he may deem necessary.

MISBRANDING.

REGULATION 17. LABEL.²

(Section 8.)

(*a*) The term "label" applies to any printed, pictorial or other matter upon or attached to any package of a food or drug product, or any container thereof subject to the provisions of this act.³

(*b*) The principal label shall consist, first, of all information which the food and drugs act, June 30, 1906, specifically requires, to wit, the name of the place of manufacture in the case of food compounds or mixtures sold under a distinctive name; statements which show that the articles are compounds, mixtures, or blends; the words "compound," "mixture," or "blend," and words designating substances or their derivatives and proportions required to be named in the case of foods and drugs. All this information shall appear upon the principal label, and should have no intervening descriptive or explanatory reading matter. Second, if the name of the manufacturer and place of manufacture are given, they should also appear upon the principal label. Third, preferably upon the principal label, in conjunction with the name of the substance, such phrases as "artificially colored," "colored with sulphate of copper," or any other such descriptive phrases necessary to be announced should be conspicuously displayed. Fourth, elsewhere upon the principal label other matter may appear in the discretion of the manufacturer. If the contents

¹ See also F. I. D. 146, June 22, 1912.

² As amended by F. I. D. 84, Jan. 31, 1908. See *United States v. 779 Cases of Molasses*, p. 218, *post*.

³ See *United States v. 65 Casks of Liquid Extracts*, p. 199, *post*; *United States v. Eight Packages or Casks of Drug Products*, p. 305, *post*; *United States v. Dr. J. L. Stephens Co.*, p. 466, *post*; *United States v. American Druggists' Syndicate*, p. 406, *post*; *McDermott, et al. v. Wisconsin*, p. 629, *post*.

are stated in terms of weight or measure, such statement should appear upon the principal label and must be couched in plain terms, as required by regulation 29.

(c) If the principal label is in a foreign language, all information required by law and such other information as indicated above in (b) shall appear upon it in English. Besides the principal label in the language of the country of production, there may be also one or more other labels, if desired, in other languages, but none of them more prominent than the principal label, and these other labels must bear the information required by law, but not necessarily in English. The size of the type used to declare the information required by the act shall not be smaller than 8-point (brevier) capitals: *Provided*, That in case the size of the package will not permit the use of 8-point type, the size of the type may be reduced proportionately.

(d) Descriptive matter upon the label shall be free from any statement, design, or device regarding the article or the ingredients or substances contained therein, or quality thereof, or place of origin, which is false or misleading in any particular. The term "design" or "device" applies to pictorial matter of every description, and to abbreviations, characters, or signs for weights, measures, or names of substances.¹

(e) An article containing more than one food product or active medicinal agent is misbranded if named after a single constituent.

In the case of drugs the nomenclature employed by the United States Pharmacopœia and the National Formulary shall obtain.

(f) The use of any false or misleading statement, design, or device appearing on any part of the label shall not be justified by any statement given as the opinion of an expert or other person, nor by any descriptive matter explaining the use of the false or misleading statement given as the opinion of an expert or other person, nor by any descriptive matter explaining the use of the false or misleading statement, design, or device.

REGULATION 18. NAME AND ADDRESS OF MANUFACTURER.

(Section 8.)

(a) The name of the manufacturer or producer, or the place where manufactured, except in case of mixtures and compounds having a distinctive name, need not be given upon the label, but if given, must be the true name and the true place. The words "packed for ———," "distributed by ———," or some equivalent phrase, shall be added to the label in case the name which appears upon the label is not that of the actual manufacturer or producer, or the name of the place not the actual place of manufacture or production.

(b) When a person, firm, or corporation actually manufactures or produces an article of food or drug in two or more places, the actual place of manufacture or production of each particular package need not be stated on the label except when in the opinion of the Secretary of Agriculture the mention of any such place, to the exclusion of the others, misleads the public.

¹ See *United States v. Five Cases of Champagne*, p. 662, *post*; and *United States v. Sweet Valley Wine Co.*, p. 625, *post*.

REGULATION 19. CHARACTER OF NAME.¹

(Section 8.)

(a) A simple or unmixed food or drug product not bearing a distinctive name should be designated by its common name in the English language; or if a drug, by any name recognized in the United States Pharmacopœia or National Formulary. No further description of the components or qualities is required, except as to content of alcohol, morphine, etc.

(b) The use of a geographical name shall not be permitted in connection with a food or drug product not manufactured or produced in that place, when such name indicates that the article was manufactured or produced in that place.²

(c) The use of a geographical name in connection with a food or drug product will not be deemed a misbranding when by reason of long usage it has come to represent a generic term and is used to indicate a style, type, or brand; but in all such cases the State or Territory where any such article is manufactured or produced shall be stated upon the principal label.³

(d) A foreign name which is recognized as distinctive of a product of a foreign country shall not be used upon an article of domestic origin except as an indication of the type or style of quality or manufacture, and then only when so qualified that it can not be offered for sale under the name of a foreign article.

REGULATION 20. DISTINCTIVE NAME.⁴

(Section 8.)

(a) A "distinctive name" is a trade, arbitrary, or fancy name which clearly distinguishes a food product, mixture, or compound from any other food product, mixture, or compound.

(b) A distinctive name shall not be one representing any single constituent of a mixture or compound.

(c) A distinctive name shall not misrepresent any property or quality of a mixture or compound.

(d) A distinctive name shall give no false indication of origin, character, or place of manufacture, nor lead the purchaser to suppose that it is any other food or drug product.

REGULATION 21. COMPOUNDS, IMITATIONS, OR BLENDS WITHOUT DISTINCTIVE NAME.

(Section 8.)

(a) The term "blend" applies to a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only.⁵

¹ As amended by F. I. D. 84, Jan. 31, 1908.

² See also F. I. D. 115 on the use of geographical names.

³ See *United States v. Thomson & Taylor Spice Co.*, p. 553, *post*; *United States v. Finlayson et al.*, p. 672, *post*; *United States v. Five Cases of Holland Gin*, p. 681, *post*.

⁴ See *United States v. 300 Cases of Mapleine*, p. 190, *post*; *United States v. 100 Barrels of Calcium Acid Phosphate*, p. 212, *post*; *United States v. American Chiclé Co.*, p. 524, *post*; *United States v. S. Gumpert & Co.*, p. 335, *post*; *United States v. 40 Barrels and 20 Kegs of Coca-Cola*, p. 395, *post*; *United States v. One Carload of Corno Horse and Mule Feed*, p. 434, *post*; *United States v. Hygienic Health Food Co.*, p. 415, *post*; *United States v. D. Auerbach & Sons*, p. 520, *post*; *United States v. Bettman-Johnson Co.*, p. 460, *post*; and *United States v. Five Cases of Champagne*, p. 662, *post*.

⁵ See *United States v. 68 Cases of Syrup*, p. 216, *post*; *United States v. 10 Barrels of Vinegar*, p. 410, *post*; and *United States v. 75 Boxes of Alleged Pepper*, p. 502, *post*.

(b) If any age is stated, it shall not be that of a single one of its constituents, but shall be the average of all constituents in their respective proportions.

(c) Coloring and flavoring can not be used for increasing the weight or bulk of a blend.

(d) In order that colors or flavors may not increase the volume or weight of a blend, they are not to be used in quantities exceeding 1 pound to 800 pounds of the blend.

(e) A color or flavor can not be employed to imitate any natural product or any other product of recognized name and quality.

(f) The term "imitation" applies to any mixture or compound which is a counterfeit or fraudulent simulation of any article of food or drug.

REGULATION 22. ARTICLES WITHOUT A LABEL.

(Section 8, paragraph 1, under "Drugs;" paragraph 1, under "Foods.")

It is prohibited to sell or offer for sale a food or drug product bearing no label upon the package or no descriptive matter whatever connected with it, either by design, device, or otherwise, if said product be an imitation of or offered for sale under the name of another article.¹

REGULATION 23. PROPER BRANDING NOT A COMPLETE GUARANTY.

Packages which are correctly branded as to character of contents, place of manufacture, name of manufacturer, or otherwise, may be adulterated and hence not entitled to enter into interstate commerce.

REGULATION 24. INCOMPLETENESS OF BRANDING.

A compound shall be deemed misbranded if the label be incomplete as to the names of the required ingredients. A simple product does not require any further statement than the name or distinctive name thereof, except as provided in regulations 19 (a) and 28.

REGULATION 25. SUBSTITUTION.

(Sections 7 and 8.)

(a) When a substance of a recognized quality commonly used in the preparation of a food or drug product is replaced by another substance not injurious or deleterious to health, the name of the substituted substance shall appear upon the label.²

(b) When any substance which does not reduce, lower, or injuriously affect its quality or strength, is added to a food or drug product, other than that necessary to its manufacture or refining, the label shall bear a statement to that effect.

REGULATION 26. WASTE MATERIALS.³

(Section 8.)

When an article is made up of refuse materials, fragments, or trimmings, the use of the name of the substance from which they are

¹ See *United States v. Five Cases of Champagne*, p. 662, *post*.

² See *William Henning & Co. v. United States*, p. 506, *post*.

³ See *United States v. 650 Cases of Tomato Catsup*, p. 183, *post*.

derived, unless accompanied by a statement to that effect, shall be deemed a misbranding. Packages of such materials may be labeled "pieces," "stems," "trimmings," or with some similar appellation.

REGULATION 27. MIXTURES OR COMPOUNDS WITH DISTINCTIVE NAMES.

(Section 8. First proviso under "Foods," paragraph 1.)

(a) The terms "mixtures" and "compounds" are interchangeable and indicate the results of putting together two or more food products.

(b) These mixtures or compounds shall not be imitations of other articles, whether simple, mixed, or compound, or offered for sale under the name of other articles. They shall bear a distinctive name and the name of the place where the mixture or compound has been manufactured or produced.

(c) If the name of the place be one which is found in different States, Territories, or countries, the name of the State, Territory, or country, as well as the name of the place, must be stated.

REGULATION 28. SUBSTANCES NAMED IN DRUGS OR FOODS.¹

(Section 8. Second under "Drugs;" second under "Foods.")

(a) The term "alcohol" is defined to mean common or ethyl alcohol. No other kind of alcohol is permissible in the manufacture of drugs except as specified in the United States Pharmacopœia or National Formulary.

(b) The words alcohol, morphine, opium, etc., and the quantities and proportions thereof, shall be printed in letters corresponding in size with those prescribed in regulation 17, paragraph (c).

(c) A drug, or food product except in respect of alcohol, is misbranded in case it fails to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, heroin, cocaine, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein.²

(d) A statement of the maximum quantity or proportion of any such substances present will meet the requirements, provided the maximum stated does not vary materially from the average quantity or proportion.³

(e) In case the actual quantity or proportion is stated it shall be the average quantity or proportion with the variations noted in regulation 29.

(f) The following are the principal derivatives and preparations made from the articles which are required to be named upon the label:

ALCOHOL, ETHYL: (*Cologne spirits, Grain alcohol, Rectified spirits, Spirits, and Spirits of wine.*)

Derivatives—

Aldehyde, Ether, Ethyl acetate, Ethyl nitrite, and Paraldehyde.

Preparations containing alcohol—

Bitters, Brandies, Cordials, Elixirs, Essences, Fluid extracts, Spirits, Sirups, Tinctures, Tonics, Whiskies, and Wines.

¹ As amended by F. I. D. 112, Jan. 6, 1910.

² See *United States v. Koca Nola Co.*, p. 213, *post*.

³ See *United States v. The Richie Co.*, p. 447, *post*; and *United States v. The Piso Co.*, p. 484, *post*.

MORPHINE, ALKALOID :

Derivatives—

Apomorphine, Dionine, Peronine, Morphine acetate, Hydrochloride, Sulphate, and other salts of morphine.

Preparations containing morphine or derivatives of morphine—

Bougies, Catarrh Snuff, Chlorodyne, Compound powder of morphine, Crayons, Elixirs, Granules, Pills, Solutions, Sirups, Suppositories, Tablets, Triturates, and Troches.

OPIUM, GUM :

Preparations of opium—

Extracts, Denarcotized opium, Granulated opium, and Powdered opium, Bougies, Brown mixture, Carminative mixtures, Crayons, Dover's powder, Elixirs, Liniments, Ointments, Paregoric, Pills, Plasters, Sirups, Suppositories, Tablets, Tinctures, Troches, Vinegars, and Wines.

Derivatives—

Codeine, Alkaloid, Hydrochloride, Phosphate, Sulphate, and other salts of codeine.

Preparations containing codeine or its salts—

Elixirs, Pills, Sirups, and Tablets.

COCAINE, ALKALOID :

Derivatives—

Cocaine hydrochloride, Oleate, and other salts.

Preparations containing cocaine or salts of cocaine—

Coca leaves, Catarrh powders, Elixirs, Extracts, Infusion of coca, Ointments, Paste pencils, Pills, Solutions, Sirups, Tablets, Tinctures, Troches, and Wines.

HEROIN :

Preparations containing heroin—

Sirups, Elixirs, Pills, and Tablets.

ALPHA AND BETA EUCAINE :

Preparations—

Mixtures, Ointments, Powders, and Solutions.

CHLOROFORM :

Preparations containing chloroform—

Chloranodyne, Elixirs, Emulsions, Liniments, Mixtures, Spirits, and Sirups.

CANNABIS INDICA :

Preparations of cannabis indica—

Corn remedies, Extracts, Mixtures, Pills, Powders, Tablets, and Tinctures.

CHLORAL HYDRATE (Chloral, U. S. Pharmacopœia, 1890) :

Derivatives—

Chloral acetophenonoxim, Chloral alcoholate, Chloralamide, Chloralimide, Chloral orthoform, Chloralose, Dormiol, Hypnal, and Uraline.

Preparations containing chloral hydrate or its derivatives—

Chloral camphorate, Elixirs, Liniments, Mixtures, Ointments, Suppositories, Sirups, and Tablets.

ACETANILIDE (Antifebrine, Phenylacetamide) :

Derivatives—

Acetphenetidine, Citrophen, Diacetanilide, Lactophenin, Methoxy-acetanilide, Methylacetanilide, Para-Iodoacetanilide, and Phenacetine.

Preparations containing acetanilide or derivatives—

Analgesics, Antineuralgics, Antirheumatics, Cachets, Capsules, Cold remedies, Elixirs, Granular effervescing salts, Headache powders, Mixtures, Pain remedies, Pills, and Tablets.

(g) In declaring the quantity or proportion of any of the specified substances the names by which they are designated in the act shall be used, and in declaring the quantity or proportion of derivatives of any of the specified substances, in addition to the trade name of the derivative, the name of the specified substance shall also be stated, so as to indicate clearly that the product is a derivative of the particular specified substance.¹

¹ See United States v. The Antikamnia Chemical Co., p. 684, *post*, and opinion of the Attorney General, p. 792, *post*.

REGULATION 29. STATEMENT OF WEIGHT OR MEASURE.¹

(Section 8. Third under "Foods.")

(a) A statement of the weight or measure of the food contained in a package is not required.² If any such statement is printed, it shall be a plain and correct statement of the average net weight or volume, either on or immediately above or below the principal label, and of the size of letters specified in regulation 17.

(b) A reasonable variation from the stated weight for individual packages is permissible, provided this variation is as often above as below the weight or volume stated. This variation shall be determined by the inspector from the changes in the humidity of the atmosphere, from the exposure of the package to evaporation or to absorption of water, and the reasonable variations which attend the filling and weighing or measuring of a package.

REGULATION 30. METHOD OF STATING QUANTITY OR PROPORTION.

(Section 8.)

In the case of alcohol the expression "quantity" or "proportion" shall mean the average percentage by volume in the finished product. In the case of the other ingredients required to be named upon the label, the expression "quantity" or "proportion" shall mean grains or minims per ounce or fluid ounce, and also, if desired, the metric equivalents therefor, or milligrams per gram or per cubic centimeter, or grams or cubic centimeters per kilogram or per liter; provided that these articles shall not be deemed misbranded if the maximum of quantity or proportion be stated, as required in regulation 28 (d).³

EXPORTS AND IMPORTS OF FOODS AND DRUGS.

REGULATION 31. PREPARATION OF FOOD PRODUCTS FOR EXPORT.

(Section 2.)

(a) Food products intended for export may contain added substances not permitted in foods intended for interstate commerce, when the addition of such substances does not conflict with the laws of the countries to which the food products are to be exported and when such substances are added in accordance with the directions of the foreign purchaser or his agent.⁴

(b) The exporter is not required to furnish evidence that goods have been prepared or packed in compliance with the laws of the foreign country to which said goods are intended to be shipped, but such shipment is made at his own risk.

(c) Food products for export under this regulation shall be kept separate and labeled to indicate that they are for export.

(d) If the products are not exported they shall not be allowed to enter interstate commerce.

¹ The section of the act under which this regulation was made has been amended by the act of Mar. 3, 1913, 37 Stat., 732. See F. I. D. 154, May 11, 1914, amending this regulation.

² But see amendment of Mar. 3, 1913, p. 15, *ante*, and F. I. D. 154.

³ See *United States v. Richie Co.*, p. 447, *post*.

⁴ See *Philadelphia Pickling Co. v. United States*, p. 612, *post*.

REGULATION 32. IMPORTED FOOD AND DRUG PRODUCTS.

(Section 11.)

(a) Meat and meat food products imported into the United States shall be accompanied by a certificate of official inspection of a character to satisfy the Secretary of Agriculture that they are not dangerous to health, and each package of such articles shall bear a label which shall identify it as covered by the certificate, which certificate shall accompany or be attached to the invoice on which entry is made.

(b) The certificate shall set forth the official position of the inspector and the character of the inspection.

(c) Meat and meat food products as well as all other food and drug products of a kind forbidden entry into or forbidden to be sold, or restricted in sale in the country in which made or from which exported, will be refused admission.

(d) Meat and meat food products which have been inspected and passed through the customs may, if identity is retained, be transported in interstate commerce.

REGULATION 33. DECLARATION.

(Section 11.)

(a) All invoices of food or drug products shipped to the United States shall have attached to them a declaration of the shipper, made before a United States consular officer, as follows:

I, the undersigned, do solemnly and truly declare that I am the _____
(Manufacturer, agent, or shipper.)
of the merchandise herein mentioned and described, and that it consists of food or drug products which contain no added substances injurious to health.

These products were grown in _____ and manufactured in _____ by _____
(Country.) (Country.) (Name)
_____ during the year _____, and are exported from _____ and consigned
of manufacturer.) (City.)

to _____. The products bear no false labels or marks, contain added color-
(City.) some
ing matter or preservative _____, and are not of a character to cause
(Name of added color or preservative.)

prohibition or restriction in the country where made or from which exported.

Dated at _____ this _____ day of _____, 19____.

(Signed) : _____.

(b) In the case of importations to be entered at New York, Boston, Philadelphia, Chicago, San Francisco, and New Orleans, and other ports where food and drug inspection laboratories shall be established, this declaration shall be attached to the invoice on which entry is made. In other cases the declaration shall be attached to the copy of the invoice sent to the Bureau of Chemistry.

REGULATION 34. DENATURING.¹

(Section 11.)

Unless otherwise declared on the invoice, all substances ordinarily used as food products will be treated as such. Shipments of substances ordinarily used as food products intended for technical pur-

¹ As amended by F. I. D. 93, May 12, 1908.

poses should be accompanied by a declaration stating that fact. Such products should be denatured before entry, but denaturing may be allowed under customs supervision with the consent of the Secretary of the Treasury, or the Secretary of the Treasury may release such products without denaturing, under such conditions as may preclude the possibility of their use as food products.

REGULATION 35. BOND, IMPORTED FOODS, AND DRUGS.

(Section 11.)

Unexamined packages of food and drug products may be delivered to the consignee prior to the completion of the examination to determine whether the same are adulterated or misbranded upon the execution of a penal bond by the consignee in the sum of the invoice value of such goods with the duty added, for the return of the goods to customs custody.¹

REGULATION 36. NOTIFICATION OF VIOLATION OF THE LAW.

(Section 11.)

If the sample on analysis or examination be found not to comply with the law, the importer shall be notified of the nature of the violation, the time and place at which final action will be taken upon the question of the exclusion of the shipment, and that he may be present, and submit evidence (Form No. 5), which evidence, with a sample of the article, shall be forwarded to the Bureau of Chemistry at Washington, accompanied by the appropriate report card.

REGULATION 37. APPEAL TO THE SECRETARY OF AGRICULTURE AND REMUNERATION.

(Section 11.)

All applications for relief from decisions arising under the execution of the law should be address to the Secretary of Agriculture, and all vouchers or accounts for remuneration for samples shall be filed with the chief of the inspection laboratory, who shall forward the same, with his recommendation, to the Department of Agriculture for action.

REGULATION 38. SHIPMENT BEYOND THE JURISDICTION OF THE UNITED STATES.

(Section 11.)

The time allowed the importer for representations regarding the shipment may be extended at his request to permit him to secure such evidence as he desires, provided that this extension of time does not entail any expense to the Department of Agriculture. If at the expiration of this time, in view of the data secured in inspecting the sample and such evidence as may have been submitted by the manufacturers or importers, it appears that the shipment can not be legally imported into the United States, the Secretary of Agriculture

¹ See *United States v. Psaki et al.*, p. 324, *post*.

shall request the Secretary of the Treasury to refuse to deliver the shipment in question to the consignee, and to require its reshipment beyond the jurisdiction of the United States.

REGULATION 39. APPLICATION OF REGULATIONS.

[Revoked June 16, 1913. *See F. I. D. 151, p. 159, post.*]

REGULATION 40. ALTERATION AND AMENDMENT OF REGULATIONS.

These regulations may be altered or amended at any time, without previous notice, with the concurrence of the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor.

The above rules and regulations are hereby adopted.

LESLIE M. SHAW,
Secretary of the Treasury.

JAMES WILSON,
Secretary of Agriculture.

VICTOR H. METCALF,
Secretary of Commerce and Labor.

WASHINGTON, D. C., *October 17, 1906.*

FOOD INSPECTION DECISIONS.¹

F. I. D. 40 (Oct. 25, 1906).

FILING GUARANTY.²

In order that both the department and the manufacturer may be protected against fraud it is requested that all guaranties of a general character filed with the Secretary of Agriculture in harmony with regulation 9, Rules and Regulations for the Enforcement of the Food and Drugs Act, June 30, 1906, be acknowledged before a notary or other official authorized to affix a seal. Attention is called to the fact that when a general guaranty has been thus filed every package of articles of food and drugs put up under the guaranty should bear the legend, "Guaranteed under the Food and Drugs Act, June 30, 1906," and also the serial number assigned thereto, if the dealer is to receive the protection contemplated by the guaranty. No other word should go upon this legend or accompany it in any way. Particular attention is called to the fact that nothing should be placed upon the label, or in any printed matter accompanying it, indicating that the guaranty is made by the Department of Agriculture. The appearance of the serial number with the phrase above mentioned upon a label does not exempt it from inspection nor its guarantor from prosecution in case the article in question be found in any way to violate the Food and Drugs Act of June 30, 1906.

F. I. D. 41 (Oct. 25, 1906).

APPROVAL OF LABELS.

Numerous requests are referred to this department for the approval of labels to be used in connection with articles of food and drugs under the Food and Drugs Act of June 30, 1906. This act does not authorize the Secretary of Agriculture nor any agent of the department to approve labels. The department therefore will not give its approval to any label. Any printed matter upon the label implying that this department has approved it will be without warrant. It is believed that with the law and the regulations before him the manufacturer will have no difficulty in arranging his label in harmony with the requirements set forth. If there be questions on which there is doubt respecting the general character of labels, decisions under the Food and Drugs Act will be rendered, of a public character and published from time to time, covering such points.

¹ Food Inspection Decisions Nos. 1 to 39, inclusive, were issued prior to the passage of the Food and Drugs Act. For "Scope and Purpose of Food Inspection Decisions," see F. I. D. 44. Where not otherwise stated, these decisions were signed by the Secretary of Agriculture.

² See regulation 9, p. 19, *ante*, and F. I. D. 62, 70, 72, 83, 96, and 99 on guaranties; also F. I. D. 153, amending this decision.

F. I. D. 42 (Oct. 30, 1906).

MIXING FLOURS.

The following communication has been received respecting the mixing of flours of different cereals:

In conformity with the custom of a century or more, the manufacturers of rye flour, in order to produce a lighter and more easily worked flour, have added a proportion of wheat flour to their rye and branded it "Rye Flour."

This custom simply conforms to the consumers' demand for a whiter loaf and from every standpoint is a perfectly legitimate operation.

Under the interpretation of the Food and Drugs Act of June 30, 1906, apparent restrictions are placed upon this compounding, and I would therefore respectfully ask your ruling upon the following points:

1. Under this interpretation will it be necessary to add the word "compound" to the brands?

2. Will it be necessary in accordance with this interpretation to name in the brand the fact that a wheat admixture has been made, in addition to the use of the word "compound," providing that word is necessary?

3. Referring to paragraph *f*, regulation 17, which reads as follows:

"An article containing more than one food product or active medicinal agent is misbranded if named after a single constituent," will it be permissible to still name the rye-wheat admixture "rye-flour?"

The Food and Drugs Act of June 30, 1906, and the rules and regulations made thereunder, provide for the proper marking of food products and penalties for misbranding.

The act also provides that a food product is not misbranded "in the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word 'compound,' 'imitation,' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale."

Keeping in view these provisions of the law, and rules and regulations made thereunder, it appears that the mixing of rye flour and wheat flour is not prohibited by the law provided the package is marked "compound" or "mixture," the word standing alone and without qualification, and also if the label contain the information which shows that it is properly branded. The mixture may also be denominated a "blend" if rye flour and wheat flour be regarded as like substances. It is held that this information in the case mentioned would be a statement of the ingredients used in making the compound. It is further held that the use of an ingredient in small quantity simply for the purpose of naming it in the list of ingredients would be contrary to the intent of the law, and therefore that the ingredients must be used in quantities which would justify the appearance of their names upon the label. The statement made of the constituents used should be of a character to indicate plainly that the article is a compound, mixture, or blend.¹

It is evident from the above explanation that the naming of a mixture of this kind "rye flour" would be plainly a violation of the law and the regulations made thereunder.

Attention is called also to the act of Congress approved June 13, 1898, United States Revised Statutes, sections 36 to 49, inclusive, imposing special taxes under the supervision of the Commissioner of Internal Revenue on mixed flour.

¹ See William Henning & Co. v. United States, p. 506, *post*; Frank et al v. United States, p. 490, *post*; United States v. 75 Boxes of Alleged Pepper, p. 502, *post*; and also United States v. Ela Mfg. Co., Notice of Judgment 118.

F. I. D. 43 (Nov. 6, 1906).

RELABELING OF GOODS ON HAND.¹

The following is a type of numerous communications received concerning the operation of the food law:

The retail grocers of our city, as well as some of the jobbers, are very much concerned over stocks of canned goods and other similar goods they might have in stock on January 1, 1907, when the new pure-food act goes into effect.

We are under the impression that where there is nothing deleterious to health contained in such goods so held it is not the department's intention to interfere in any way, shape, or form with them.

Where these goods are held by retailers in our own city does this come within the jurisdiction of the National law, or is it controlled only by State laws?

Similar letters have been received relating to drugs, medicines, and other articles affected by the operation of the law. A general answer is deemed advisable, which, it is hoped, will cover the cases in question.

Section (i) of regulation 17 provides that—

The regulation regarding the principal label will not be enforced until October 1, 1907, in the case of labels printed and now on hand, whenever any statement therein contained which is contrary to the Food and Drugs Act, June 30, 1906, as to character of contents, shall be corrected by a supplemental label, stamp, or paster. All other labels now printed and on hand may be used without change until October 1, 1907.

It is held that under this regulation labels which contain statements relating to the name of manufacturer, the place of manufacture, etc., which are not in harmony with the general meaning of the law may be used if on hand on the 1st of January, 1907, the day on which the regulations become effective. Any statement, however, respecting the character of the contents which is false or misleading should be corrected as indicated. The correction should secure the obliteration of the misstatement either by placing the supplemental label or paster over it or obliterating it in some other way. If the goods contain artificial color or preservative other than ordinary condimental substances (salt, sugar, vinegar, wood smoke, spices, and condiments of all kinds), that fact should appear upon the supplemental stamp or paster. If any of the words required to be placed upon drugs and foods in the specific wording of the act do not appear upon the label, such as alcohol, opium, etc., it is held that the correction must include the enumeration of these substances, as provided for in regulations 28 and 29.

If goods that are packed and sealed in a carton which contains the bottle or other package also sealed and labeled were not in the hands of the manufacturer after January 1, 1907, but had been already delivered to the jobber or dealer, it will be held sufficient to mark the external carton alone, provided the goods are sold only in the unbroken carton. If the container, however, holds a large number of separate packages, it will be necessary that each of the separate packages to be sold as such shall be labeled with the words required specifically by the act.

It must not be forgotten that regulation 17, section (i), is for the purpose of avoiding the expense of relabeling articles already packed

¹ See also F. I. D. 78.

and branded at the time the regulations go into effect, and which necessarily could not have been so packed and branded with any intent to evade the provisions of the law, and it is expected that jobbers and dealers will do everything in their power to bring the packages now on hand into as close harmony with the provisions of the act and the regulations made thereunder as possible.

All articles in the hands of manufacturers, jobbers, and dealers on the 1st day of January, 1907, which are sold wholly within the State in which they are found on that date are exempt from the provisions of the act. Thus the use of the supplemental label, stamp, or paster is required only on those articles which on or after the 1st day of January, 1907, enter interstate commerce or are offered for sale in the District of Columbia and the Territories. It is believed that the provisions of regulation 17, section (i), can be complied with without great annoyance and expense. It will be deemed sufficient if the supplemental pasters and labels are attached at the time the goods are shipped beyond the State line, that is, they need not necessarily be attached to such articles on the 1st day of January, but at any time thereafter when prepared for interstate commerce. Thus the labor of meeting this requirement will be distributed according to the exigencies of actual trade. On and after October 1, 1907, the labels must be originally properly printed, and no further amendment will be considered.

F. I. D. 44 (Dec. 1, 1906).

SCOPE AND PURPOSE OF FOOD INSPECTION DECISIONS.

From the tenor of many inquiries received in this department it appears that many persons suppose that the answers to inquiries addressed to this department, either in letters or in published decisions, have the force and effect of the rules and regulations for the enforcement of the Food and Drugs Act of June 30, 1906. The following are illustrations of the inquiries received by this department:

Must we stamp all goods as conforming to the drug and food law, whether they have alcohol and narcotics therein, or not?

On a brand of salad oil, which is a winter-strain cotton-seed oil, can it be sold under the brand of salad oil, or must it state that it is cotton-seed oil?

It seems highly desirable that an erroneous opinion of this kind should be corrected. The opinions or decisions of this department do not add anything to the rules and regulations nor take anything away from them. They therefore are not to be considered in the light of rules and regulations. On the other hand, the decisions and opinions referred to express the attitude of this department in relation to the interpretation of the law and the rules and regulations, and they are published for the information of the officials of the department who may be charged with the execution of the law and especially to acquaint manufacturers, jobbers, and dealers with the attitude of this department in these matters. They are therefore issued more in an advisory than in a mandatory spirit. It is clear that if the manufacturers, jobbers, and dealers interpret the rules and regulations in the same manner as they are interpreted by this

department, and follow that interpretation in their business transactions, no prosecution will lie against them. It needs no argument to show that the Secretary of Agriculture must himself come to a decision in every case before a prosecution can be initiated, since it is on his report that the district attorney is to begin a prosecution for the enforcement of the provisions of the act.

In so far as possible it is advisable that the opinions of this department respecting the questions which arise may be published. It may often occur that the opinion of this department is not that of the manufacturer, jobber, or dealer. In this case there is no obligation resting upon the manufacturer, jobber, or dealer to follow the line of procedure marked out or indicated by the opinion of this department. Each one is entitled to his own opinion and interpretation and to assume the responsibility of acting in harmony therewith.

It may be proper to add that in reaching opinions and decisions on these cases the department keeps constantly in view the two great purposes of the Food and Drugs Act, namely, to prevent misbranding and to prohibit adulteration. From the tenor of the correspondence received at this department and from the oral hearings which have been held, it is evident that an overwhelming majority of the manufacturers, jobbers, and dealers of this country are determined to do their utmost to conform to the provisions of the act, to support it in every particular, and to accede to the opinions of this department respecting its construction. It is hoped, therefore, that the publication of the opinions and decisions of the department will lead to the avoidance of litigation which might arise due to decisions which may be reached by this department indicating violations of the act, violations which would not have occurred had the opinions and decisions of the department been brought to the attention of the offender.

F. I. D. 45 (Dec. 1, 1906).

BLENDING WHISKIES.¹

Many letters are received by the department making inquiries concerning the proper method of labeling blended whisky. Manufacturers are anxious to know the construction placed by the department upon this particular part of the Food and Drugs Act of June 30, 1906, and to ascertain under what conditions the words "blended whisky" or "whiskies" may be used. The following quotation from one of these letters presents a particular case of a definite character:

On account of the uncertainty prevailing in our trade at the present time as to how to proceed under the pure-food law and regulations regarding what will be considered a blend of whiskies, I am taking the liberty of expressing to you to-day two samples of whisky made up as follows:

Sample A contains 51 per cent of Bourbon whisky and 49 per cent of neutral spirits. In this sample a small amount of burnt sugar is used for coloring, and a small amount of prune juice is used for flavoring, neither of which increases the volume to any great extent.

Sample B contains 51 per cent of neutral spirits and 49 per cent of Bourbon whisky. Burnt sugar is used for coloring, and prune juice is used for flavoring, neither of which increases the volume to any great extent.

¹ Revoked by F. I. D. 113. See F. I. D. 65, 95, 98, 113, 118 and 127 on the labeling of whiskies. See also opinions of the Attorneys General, pp. 775, 783, 797, *post*, Report of the Solicitor General, p. 818, *post*, and Decision of the President, p. 831, *post*, on the same subject.

I have marked these packages "blended whiskies" and want your ruling as to whether it is proper to thus brand and label such goods.

My inquiry is for the purpose of guiding the large manufacturing interests in the trade that I represent.

In a subsequent letter from the same writer the following additional statement is made:

The reason for wanting your decision or ruling in this matter is just this: No house in the trade can afford to put out goods and run the risk of seizure and later litigation by the Government on account of the odium that would be attached to fighting the Food and Drugs Act.

The question presented is whether neutral spirits may be added to Bourbon whisky in varying quantities, colored and flavored, and the resulting mixture be labeled "blended *whiskies*." To permit the use of the word "whiskies" in the described mixture is to admit that flavor and color can be added to neutral spirits and the resulting mixture be labeled "whisky." The department is of opinion that the mixtures presented can not legally be labeled either "blended whiskies" or "blended whisky." The use of the plural of the word "whisky" in the first case is evidently improper for the reason that there is only one whisky in the mixture. If neutral spirit, also known as cologne spirit, silent spirit, or alcohol, be diluted with water to a proper proof for consumption and artificially colored and artificially flavored, it does not become a whisky, but a "spurious imitation" thereof, not entirely unlike that defined in section 3244, Revised Statutes. The mixture of such an imitation with a genuine article can not be regarded as a mixture of like substances within the letter and intent of the law.

F. I. D. 46 (Dec. 13, 1906).¹

FICTITIOUS FIRM NAMES.

F. I. D. 46, issued on December 13, 1906, on the subject of fictitious firm names, is hereby amended to read as follows, for the purpose of obviating any ambiguity that may have existed in the original decision. The amended portion is set in italics.

The following extract from a letter is typical of a question frequently asked:

In connection with our manufacture of flavoring extracts, we produce an article containing a certain percentage of artificial coumarin and vanillin. This product has been placed on the market under the name of _____ and Company, a fictitious firm, although dealers have always understood that it was our product. Is there any objection to our continuing to brand the product as manufactured by _____ and Company?

The same question has frequently been asked by importers who state that they desire to assume the responsibility for particular brands.

It has been held by the Attorney General (F. I. D. 2) that—

the words " * * * Daisy Sugar Corn, _____ Company, Milwaukee, Wis.," clearly imply that the goods referred to are manufactured or prepared by that company in Wisconsin. The general public, unfamiliar with trade practices, would inevitably reach that conclusion.

¹ As amended Feb. 21, 1907.

Regulation 18 provides that if the name of the manufacturer and the place of manufacture be given, they must be the true name and the true place. It would appear, therefore, that the use of a fictitious name in such a manner that it would be understood to be the name of the manufacturer would be clearly a violation of regulation 18. It is apparent that the provisions of regulation 18 will not be fulfilled by the nominal incorporation of a fictitious firm. The regulations require that goods must be actually manufactured by the firm represented on the label as the manufacturer.

When a proper name, other than that of the manufacturer, is placed upon a label it must not be used in the possessive. For instance,

CHARLES GASTON'S
OLIVE OIL
BORDEAUX

can only be properly used on an oil manufactured by Charles Gaston at Bordeaux. The same is true if the designation

GASTON'S
OLIVE OIL
BORDEAUX

be employed.

On the other hand, the word "Gaston" might be used in an adjective sense, and not in the possessive case as qualifying the words "olive oil," in a manner that would indicate that it represented a brand and not a manufacturer, as

GASTON OLIVE OIL.

Or,

OLIVE OIL, GASTON BRAND.

In such case, however, neither given name nor initials should be employed. The word "Gaston" should be in the same type as "olive oil" and in equal prominence, thus forming a part of the label.

The phrase "Olive Oil, Charles Gaston Brand," may be used, in which case the name of the actual manufacturer should appear, in order that no false indication of the name of the person or firm manufacturing the product may be given.

F. I. D. 47 (Dec. 13, 1906).

FLAVORING EXTRACTS.

The percentage of alcohol is not required to be stated in the case of extracts sold for the preparation of foods only. It is held, however, that extracts which are sold or used for any medicinal purpose whatever should have the percentage of alcohol stated on the label.

Numerous inquiries are received regarding the proper designation of products made in imitation of flavoring extracts or in imitation of flavors. Such products include "Imitation vanilla flavor," which is made from such products as tonka extract, coumarin, and vanillin,

with or without vanilla extract. They may also include numerous preparations made from synthetic fruit ethers intended to imitate strawberry, banana, pineapple, etc. Such products should not be so designated as to convey the impression that they have any relation to the flavor prepared from the fruit. Even when it is not practicable to prepare the flavor directly from the fruit, "imitation" is a better term than "artificial."

These imitation products should not be designated by terms which indicate in any way by similarity of name that they are prepared from a natural fruit or from a standard flavor. The term "venallos," for instance, would not be a proper descriptive name for a preparation intended to imitate vanilla extract. Such products should either be designated by their true names, such as "vanilla and vanillin flavor," "vanillin and coumarin flavor," or by such terms as "imitation vanilla flavor" or "vanilla substitute."¹

Articles in the preparation of which such substitutes are employed should not be labeled as if they were prepared from standard flavors or from the fruits themselves. For instance, ice cream flavored with imitation strawberry flavor should not be designated as "strawberry ice cream." If sold as strawberry ice cream without a label the product would appear to be in violation of regulation 22.

Artificial colors should be declared whenever present.

F. I. D. 48 (Dec. 13, 1906).

SUBSTANCES USED IN THE PREPARATION OF FOODS.

The following letter was recently received at the Department of Agriculture:

We import a preparation of gelatin preserved with sulphurous acid for the purpose of fining wine. This gelatin is not used as a food and does not remain in the wine, although a small amount of the sulphurous acid may be left in the wine. Please inform us if the sale of this product is a violation of the food law.

It is held that the products commonly added to foods in their preparation are properly classed as foods and come within the scope of the Food and Drugs Act. The department can not follow a food product into consumption in order to determine the use to which it is put. Pending a decision on the wholesomeness of sulphurous acid as provided in regulation 15 (b), its presence should be declared.

F. I. D. 49 (Jan. 8, 1907).

TIME REQUIRED TO REACH DECISIONS ON DIFFERENT PROBLEMS CONNECTED WITH THE FOOD AND DRUGS ACT, JUNE 30, 1906.

Many letters have reached the department asking for action on very important questions connected with the Food and Drugs Act which require much study and time to secure all the facts necessary

¹ See *United States v. Three Barrels of Vanilla Tonka and Compound*, p. 356, *post*; and *Hudson Mfg. Co. v. United States*, p. 506, *post*.

to the rendering of a just decision. It is quite impossible to answer all such letters in detail. The following general statement shows the attitude of the department on questions of this kind:

All manufacturers and dealers have copies of the law and regulations or can secure them and study them carefully. Each manufacturer and dealer should conduct his business as nearly as possible in harmony with the law as he interprets it. When each particular problem involved reaches a solution in this department, it is hoped it will be found that the manufacturers and jobbers have come also to a similar decision in the matter. Public notice will be given of each decision as it is issued, that the manufacturers and dealers may be informed and be able at once to place themselves in line with the decisions of the department. In this way it is hoped that all injustice will be avoided in the execution of the law and everyone be given an opportunity to put himself right and to have due notice of decisions which may be made.

The department will use every endeavor to reach prompt decisions, but must take time to collect the facts and subject them to a proper study; otherwise the decisions would not have the value which should attach to them in important matters affecting the execution of the law.

F. I. D. 50 (Jan. 18, 1907).

IMITATION COFFEE.

A manufacturer writes as follows:

We beg to ask for your opinion as regards the hyphenated word "Cereal-Coffee," and whether or not we are entitled to its use for a cereal substitute for coffee. * * * In our opinion the term "Cereal-Coffee" would come under the so-called trade name and distinctive name.

It is held that since the product mentioned is not a coffee it can not properly be called by the term mentioned. Regulation 20 (*d*) provides that a distinctive name shall give no false indication of character. The use of the name "cereal-coffee" might be taken to indicate that the product is coffee or has the properties of coffee, and hence the use of this term does not comply with the definition of distinctive name. Even if the product consist in part of coffee, the name would not be correct. It is suggested that products of this nature be designated as "imitation coffee," as provided in regulation 21 (*f*). In such case the word "imitation" should be in uniform type, on uniform background, and should be given equal prominence with the word "coffee."

F. I. D. 51 (Jan. 18, 1907).

COLORING OF BUTTER AND CHEESE.

Numerous inquiries, of which the following is an illustration, have been received by the department:

Will you kindly inform me concerning the coloring of butter and cheese under the pure-food law? Would it be unlawful to color butter and cheese as now practiced?

The coloring of butter is specifically permitted in the law of August 2, 1886 (24 Stat., 209), and the coloring of cheese in the law of June 6, 1896 (29 Stat., 253). It is held by the department that the Food and Drugs Act does not repeal the provisions of the acts referred to above and the addition of harmless color to these substances may be practiced as therein provided, and that the presence of coloring matter specifically recognized by acts of Congress as a constituent is not required to be declared on the label.

F. I. D. 52 (Jan. 18, 1907).

FORM OF LABEL.

The following is an extract from a letter recently received:

We do not understand the requirements of the regulations respecting the arrangement of labels; that is, the order in which the various features of the label should be arranged.

To meet the requests for the opinion of the department regarding the proper arrangement of a label, the following order is suggested:

1. Name of substance or product.
2. In case of foods, words which indicate that the articles are compounds, mixtures, or blends, and the word "Imitation," "Compound," or "Blend," as the case may be.
3. Statements designating the quantity or proportion of the ingredients enumerated in the law, or derivatives and preparations of same,¹ as mentioned under regulation 28; also statements of other extraneous substances whose presence should be declared, such as harmless coloring matter, or any necessary statement regarding grade or quality.

(The statements specified in paragraphs 1, 2, and 3, should appear together without any intervening descriptive or explanatory matter.)

4. Name of manufacturer (if given).
5. Place of manufacture (if given, or when required in case of food mixtures or compounds bearing a distinctive name).

It is stated in regulation 17 that if the name of the manufacturer and place of manufacture be given they should appear upon the principal label. Although the law does not require that the name of the manufacturer be given, or the place of manufacture, except in case of food mixtures and compounds having a distinctive name, it is held that if they are given they must be true, and should be placed with

¹ Attention is called to the fact that the declaration of alcohol and its derivatives is not required in foods.

the required information on the principal label. The arrangement of the label is the same for both food and drug products and an example of each is given.

Sample label for food product.

[Name of product.]

[Declaration required by
paragraphs 2 and 3.]

[Name of manufacturer,
if given.]

[Place of manufacture, if
given.]

<p>KETCHUP.</p> <p>ARTIFICIALLY COLORED.</p> <hr/> <p>[Descriptive matter, if desired, but preferably at bottom of label.]</p> <hr/> <p>BLANK & CO.,</p> <p>PORTLAND, ME.</p> <hr/> <p>[Descriptive matter, if desired.]</p>
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Sample label for drug product.

[Name of product.]

[Declarations required by
paragraphs 2 and 3.]

[Name of manufacturer,
if given.]

[Place of manufacture, if
given.]

<p>COUGH SYRUP.</p> <p>ALCOHOL, 10 PER CENT.</p> <p>MORPHINE, $\frac{1}{2}$ GRAIN PER OUNCE.</p> <p>CHLOROFORM, 40 MINIMS PER OUNCE.</p> <hr/> <p>[Descriptive matter, if desired, but preferably at bottom of label.]</p> <hr/> <p>JOHN JONES & CO.,</p> <p>WASHINGTON, D. C.</p> <hr/> <p>[Descriptive matter, if desired.]</p>
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Any descriptive or explanatory matter that may appear on the principal label, therefore, should be placed at the bottom of the label, or between No. 3 and No. 4, and should be clearly separated from other features of the label by means of a suitable line or space. Statements regarding the reason for using alcohol, artificial coloring matter, and other extraneous substances, come under the head of descriptive or explanatory matter, and should not be interspersed with the declarations required under Nos. 2 and 3.

The information called for under No. 3 should be so worded as to give only the required information, as, for example, "alcohol 17 per cent" or "artificially colored." All numbers used in expressing quantity or proportion of substances required to be stated (see regulation 28) should be expressed in the Arabic notation.

Each substance required to be declared under No. 3 should be printed on a separate line and in type specified in regulation 17 (c),

F. I. D. 53 (Jan. 28, 1907).

FORMULA ON THE LABEL OF DRUGS.

Many inquiries are received relative to the necessity of giving the formula of medicinal remedies on the label. The following is typical:

I should like to know if it will be necessary for me to state on a label the name of the products from which I prepare my proprietary medicine in order to conform with the Pure Food and Drugs Act. If I do this, it will prohibit me from manufacturing and selling a remedy which is a secret of my own; and anyone buying it could, from the label, tell what ingredients were used in its preparation and make his own supply of this medicine. How does the United States Government expect to protect those who have secret medicinal preparations they wish to sell at a profit? If the Pure Food Commission desires, I will send them a sample bottle of my medicine for their inspection and approval.

The Food and Drugs Act, June 30, 1906, does not require the formula of drug products to be given on the label, but requires only that the quantity or proportion of the ingredients enumerated in the law, and derivatives and preparations of same (regulation 28), shall be clearly set forth on the label or labels of all preparations used for the treatment or prevention of disease, either internally or externally, for man or other animals. This includes sample packages as well as regular trade packages.

The question is also frequently asked whether a medicinal preparation would be exempt from the operation of the law if the formula were given on the label. The formula on the label is very desirable, but this information is not required by the law. The act forbids the use of any statement, design, or device in connection with any drug product which is false or misleading in any particular. A defect of this kind would not be corrected by giving the formula on the label. If the formula is given, it must be the correct and complete formula. It is held that, in addition to those substances required by the act to be named, if only a part of the active medicinal agents used in the manufacture of a drug product are set forth on the label, such a procedure is misleading and therefore forbidden by the law. All drug products and their labels must conform to the act, whether the formula is or is not given on the label.

F. I. D. 54 (Mar. 13, 1907).

DECLARATION OF THE QUANTITY OR PROPORTION OF ALCOHOL PRESENT IN DRUG PRODUCTS.

The question of stating the percentage of alcohol present in drug products has caused a multitude of inquiries. The following questions along this line serve as examples:

Is it necessary to give the amount of alcohol present in U. S. Pharmacopœial or National Formulary products? It seems to me that such a requirement is absurd, and not contemplated within the spirit of the act. None of them are patent medicines. Will I be compelled to tell how much alcohol is present in such goods?

If we apply for and obtain a serial number, must we in addition to putting this number on our labels state the per cent of alcohol?

Will it be necessary to give the per cent of alcohol present in such products as ether, chloroform, collodion, spirit of nitrous ether, and similar preparations?

The law is specific on the subject of declaring the amount of alcohol present in medicinal agents, as can readily be seen from the following language: "An article shall also be deemed misbranded * * * if the package fail to bear a statement on the label of the quantity or proportion of any alcohol * * * contained therein." No medicinal preparations are exempt, whether they are made according to formulæ given in the U. S. Pharmacopœia or National Formulary or formulæ taken from any other source. The serial number, with or without the guarantee legend, does not exempt a preparation from this requirement. The law does not make any statement as to the amount of alcohol that may or may not be employed. It requires, however, that whatever amount be present shall be set forth on the label. The percentage of alcohol given on the label should be the percentage of absolute alcohol by volume contained in the finished product. The manner in which it should be printed is shown in F. I. D. 52.

F. I. D. 55 (Mar. 13, 1907).

METHOD OF STATING QUANTITY OR PROPORTION OF PREPARATIONS (CONTAINING OPIUM, MORPHINE, ETC.) USED IN MANUFACTURING OTHER PREPARATIONS.

Many inquiries are received as to the method of stating the quantity or proportion of preparations (containing opium, morphine, etc.) used in the manufacture of other preparations. Of these the following are typical:

If the label on the bottle were to bear the words "Tincture of Opium," I reason that as this is a definite preparation, constituting a preparation of opium, and so definite as to its composition that to any intelligent person it expresses definitely all that it is desirable to express, the use of this title alone should be sufficient. I feel that as a preparation it is distinct from opium, and if this particular tincture is used in the manufacture of a preparation the mention of it alone should be sufficient.

Where extract or tincture of *cannabis indica*, or extract of opium, is employed in making other drug products, would it not be complying with the law if the use of such articles be clearly indicated on the label as prescribed by the law, or is it necessary to give the actual amounts of the drugs themselves represented by these preparations?

Names of drug products bearing any of the names of the ingredients enumerated in the act are construed as representing "preparations" within the meaning of the act; and if the same are clearly declared upon the label as required by regulations 17 and 30, it will not be necessary to give the actual amount of the primary drugs used or represented by such article. It is desirable, however, that the word or words used in the law shall constitute the first part of the name of the product. For example: "Opium, Tincture of;" "*Cannabis Indica*, Extract of," followed by the amount of tincture or extract used.

F. I. D. 56 (Mar. 13, 1907).

NAMES TO BE EMPLOYED IN DECLARING THE AMOUNT OF THE INGREDIENTS AS REQUIRED BY THE LAW.

Many inquiries are coming to this department relative to the names that may be employed in declaring the quantity or proportion of the ingredients, as required by Congress.

The following are representative:

The word "alcohol" has received so much unfavorable notoriety during the last few years that we hesitate to place it upon our labels. Could we not employ some other words in place of it, such as "cologne spirits," "spirits of wine," "pure grain alcohol," etc.?

Would it be satisfactory for us to use "Phenylacetamide," or the following formula, $C_6H_5NH(CH_3CO)$, for the chemical acetanilide?

One of our preparations contains trichlorethidene ethyl alcoholate, which would undoubtedly under the law be considered a derivative of chloral hydrate. Will it be satisfactory for us to use this name on our trade packages in giving the amount of this chemical present in the product?

In the manufacture of some of our products we use opium. It would, however, be a financial loss to state this fact on the label. Could we not say this preparation contains 20 grains of the concentrated extract of *Papaver somniferum* to the fluid ounce?

Dover's powder is mentioned in the regulations as one of the preparations of opium. It would seem at first glance that Dover's powder as a preparation, if mentioned on the label, would be all that could be required as to opium.

One of the objects of the law is to inform the consumer of the presence of certain drugs in medicines, and the above terms do not give the average person any idea as to the presence or absence of such drugs. In enumerating the ingredients, the quantity or proportion of which is required to be given upon the principal label of any medicinal preparation in which such ingredients may be present, the act uses only common names, and the permission to use any but such common names for any ingredients required to be declared upon the label is neither expressed nor implied in any part of the law.

The term used for acetanilide is "acetanilide" and not phenylacetamide. No reference is made to the use of the chemical formula in designating the presence of chemicals. The words "chloral hydrate" appear in the act, but not the chemical name trichlorethidene glycol. It can readily be seen that if the act were not closely adhered to in this connection there would soon be such a confusion and multiplicity of names and phrases that one of the objects of the act would be defeated.

The names to be employed in stating the quantity or proportion of the ingredients required by the act to appear on the label of all medicinal preparations containing same are—

First. Those used in the law for the articles enumerated; example, "alcohol," not "spiritus rectificatus."

Second. In the case of derivatives: (a) The name of the parent substance used in the act should constitute part of the name; example, "chloral acetone," not "trichlorethidene dimethyl ketone." (b) The trade name, accompanied in parentheses by the name of the parent substance; example, "dionine (morphine derivative)."¹

Third. Names of preparations containing the name of some ingredient used in the act. In such cases the name used in the act should constitute the first portion of the name of the preparation. (See F. I. D. 55.)

Fourth. Common names (such as laudanum, Dover's powder, etc.) of preparations containing an ingredient enumerated in the law, provided such name or names are accompanied in parentheses by some such phrase as "preparation of opium" or "opium prepara-

¹ See *United States v. 100 Cases of Antikamnia Tablets*, p. 416, *post*; and *United States v. Antikamnia Chemical Co.*, p. 684, *post*.

tion," followed by the number of minims or grains, as specified in the regulations; for instance, "laudanum (preparation of opium), 40 minims per ounce."

F. I. D. 57 (Mar. 13, 1907).

PHYSICIANS' PRESCRIPTIONS.¹

THE STATUS OF PACKAGES COMPOUNDED ACCORDING TO PHYSICIANS' PRESCRIPTIONS AND ENTERING INTO INTERSTATE COMMERCE.

Packages resulting from the compounding of physicians' prescriptions under the Food and Drugs Act are the subject of many queries, of which the following are representative:

If a druggist compounds a physician's prescription and sends it into an adjoining State, will it be necessary to state upon the label the amount of alcohol, morphine, etc., that may be present?

Supposing a regularly licensed practicing physician has patients located in various States of the Union and supplies medicines to them through the mails, by express, and otherwise, do such packages come under the provisions of the law, and, if so, can the required information be given in pen and ink on the label?

We treat drug addictions on a very gradual tonic treatment reduction plan. For instance, if John Doe writes for information as to the home treatment for his addiction, I send him a symptom blank which contains, among other questions, an inquiry as to the kind of drug he uses, how he uses it, the length of time he has used it, etc. In addition to giving me a complete history of his case, he states he is using 10 grains of sulph. of morphine (each 24 hours), hypodermically or internally, as the case may be. In prescribing in his case I immediately put him on just one-half of the amount he reports as his daily allowance, combining same with a bitter tonic.

It is necessary for the reduction in drug cases to be made without the patient's knowledge. It is, of course, understood by all physicians that you can not trust a drug habitué to properly make his own reductions, for, as a matter of fact, if he knew to what extent I was reducing his daily allowance of opiates, he would imagine the reduction too rapid, he would get frightened, and would take to his former drug for relief. Treatment prepared in this way I do not think would come under the head of a proprietary preparation or a patent medicine, as I prescribe the contents of each bottle to meet the requirements of each individual patient. All instructions as to the conduct of treatment and the use of auxiliary remedies are given by letter; consequently there are no printed labels or cartons containing any claims concerning the efficacy of this treatment.

I would be pleased to have you inform me whether in your opinion I would be violating the pure-food law in any manner, shape, or form should I continue to label my preparations as I am now doing, and in having them prepared in ——— and forwarded direct to my patients in this and other States.

If a package compounded according to a physician's prescription be shipped, sent, or transported from any State or Territory or the District of Columbia to another State or Territory or the District of Columbia by a compounder, druggist, physician, or their agents, by mail, express, freight, or otherwise, the label upon such package is required to bear the information called for by Congress. If, however, the patient himself, or a member of his household, or the physician himself carries such package across a State line, and such package is not subject to sale, it is held that such package need not be marked so as to conform with the law, because such a transaction is not considered one of interstate commerce.

¹ See *United States v. Dr. J. L. Stephens Co.*, p. 466, *post*.

The package may be marked so as to comply with the act by either stamp, pen and ink, or typewriter, provided all such written matter is distinctly legible and on the principal label, as prescribed in regulation 17.

F. I. D. 58 (Mar. 13, 1907).

THE LABELING OF PRODUCTS USED AS FOODS AND DRUGS AS WELL AS FOR TECHNICAL AND OTHER PURPOSES.¹

Frequent requests for information relative to the proper labeling of products bearing the names of foods and drugs, but used also for technical and other purposes, are received. The following are typical:

We will kindly ask you to advise us in regard to the new law that governs the line of oils. We manufacture a compound product, so-called "turpentine," which contains pure turpentine and a very fine petroleum product. It is used in most branches where pure turpentine is used, with the exception of medicinal purposes, for which we do not sell it.

We understand that if we were to sell any cotton-seed oil so branded as to indicate that it was intended to be used as a food, as, for example, under the brand "Blank Salad Oil," it would be necessary to observe the requirements of the law referred to; but we are in doubt and would be glad to have your opinion as to whether a sale or shipment of this oil (for lubricating purposes) under the ordinary trade brand of cotton-seed oil, and without anything to indicate that it was of a quality suitable for use as a salad oil, would subject us to the provisions of the act.

During personal interviews the question of marking chemical reagents has also been discussed.

Products used in the arts and for technical purposes are not subject to the Food and Drugs Act. It is, however, a well-recognized fact that many articles are used indiscriminately for food, medicinal, and technical purposes. It is also well known that some products employed for technical purposes are adulterated or misbranded within the meaning of this act. Inasmuch as it is impossible to follow such products into consumption in order to determine to what use they are finally put, it is desirable that an article sold under a name commonly applied to such article for food, drug, and technical purposes be so labeled as to avoid possible mistakes. The ordinary name of a pure and normal product, whether sold for food, drug, technical, or other purposes, is all that is necessary. Pure cotton-seed oil or turpentine may be sold without any restrictions whatever, whether such article is sold for food, medicinal, or technical purposes, but it is suggested that a cotton-seed oil intended for lubricating purposes, or a so-called turpentine consisting of a mixture of turpentine and petroleum oils, used by the paint trade, be plainly marked so as to indicate that they are not to be employed for food or medicinal purposes. Such phrases as the following may be used: "Not for Food Purposes," "Not for Medicinal Use," or for "Technical Purposes Only," or "For Lubricating Purposes," etc.

In order to avoid complication it is suggested that chemical reagents sold as such be marked with such phrases as the following: "For Analytical Purposes," or "Chemical Reagent," etc.

¹ See *United States v. Lorick and Lowrance*, p. 357, *post*; *United States v. 300 Cans of Frozen Eggs*, p. 444, *post*; and *United States v. 13 Crates of Frozen Eggs*, p. 669, *post*.

F. I. D. 59 (Mar. 13, 1907).

NATIONAL FORMULARY APPENDIX.

The National Formulary is one of the standards recognized under the law. The question has been asked a number of times whether the appendix of this authority would be construed as part and parcel of the book itself. On page IV of the preface it is distinctly stated that the formulæ collected in the appendix of the National Formulary are "no longer designated as 'N. F.' preparations." This shows that these formulæ are not integral parts of the book under the law, which covers only those products of the National Formulary recognized as such by this authority. By this it is understood that if a drug product is sold under a name contained in the appendix of the National Formulary, it will not be necessary for such product either to conform to the standard indicated by the formula or to declare upon the label its own standard strength, quality, and purity if a different formula is employed in its manufacture. Such articles are, however, subject to the law in every other respect, as is the case of other medicinal products not recognized by the United States Pharmacopœia or National Formulary.

F. I. D. 60 (Mar. 25, 1907).

MINOR BORDER IMPORTATIONS.

Inquiry has frequently been made regarding the application of regulation 33 (requiring a declaration to be attached to the invoice) to foods and drugs brought into the United States in small quantities by farmers living near the border. One correspondent says:

Farmers along the border are in the habit of occasionally bringing in, in their own teams, maple sugar in small quantities, also butter and like articles of food products of their own raising, and offering the same for entry at the different offices on the frontier. * * * The main question is as to whether or not the affidavits and other proof required by the pure-food law shall be required in these instances of minor importations of this class of articles.

Considering the nature of these importations it is held that regulation 33 does not apply to them and that they may be imported without the declaration. Such products are subject to inspection, however, and if found to be in violation of the law will be excluded.

F. I. D. 61 (Mar. 25, 1907).

COCOA BUTTER SUBSTITUTES.

A manufacturer writes:

We use in the preparation of chocolate sticks a guaranteed pure production of cocoanut oil. May this product be sold merely as confectionery, and not as chocolate sticks? If not, would it be satisfactory for us to mark the product as "Chocolate sticks prepared with substitute butter?"

Regulation 22 prohibits the sale, or offer for sale, in interstate or foreign commerce or in the District of Columbia or in any Territory of the United States, of a food or drug product which bears no label whatever if said product be an imitation of or offered for sale under

the name of another article. It would clearly be a violation of the law to sell an article which was made in imitation of chocolate, even though it be sold under the general name of a confection. Such an article should be labeled in such manner as to correctly represent its true nature.

Regulation 25 (a) provides:

When a substance of a recognized quality commonly used in the preparation of a food or drug product is replaced by another substance not injurious or deleterious to health, the name of the substituted substance shall appear upon the label.

It is held that cocoa butter is the only fat that can properly be used in chocolate. The declaration of foreign fats merely as "substitute butter" is apparently not sufficient; the nature of the fat employed should be stated.

F. I. D. 62 (Mar. 25, 1907).

GUARANTY ON IMPORTED PRODUCTS.¹

Many inquiries of the following type have been received by the department:

We will take it as a favor if you will advise us if (since our goods are all imported and so must pass the custom-house before being sold) the fact of their having passed the customs authorities and the Department of Agriculture examination is not in itself a guaranty that they conform with the pure-food laws as defined by the act of Congress approved June 30, 1906, entitled "An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, liquors," etc.

The department makes a systematic inspection of imported foods and drugs when they arrive at the custom-houses; and while such inspection does not include an examination of samples taken from every package of the aforesaid articles, it is sufficient to indicate that the article is suitable to enter the country and be sent into interstate commerce as long as it retains its identity in the unbroken package. If imported foods and drugs are taken from the original packages and repacked, they become subject to inspection as if of domestic origin, and the persons handling and selling said articles are not immune from prosecution in the event that a subsequent inspection discloses that all or any portion of said foods or drugs are adulterated or misbranded according to the provisions of said statute or the regulations made thereunder.

Only a wholesaler, jobber, manufacturer, or other party residing in the United States can give a guaranty within the meaning of said act. A foreign manufacturer or other foreign dealer can not give the guaranty prescribed in said law, nor can the agent of such foreign manufacturer or dealer give said guaranty unless such agent be a resident of the United States and unless he actually sells the goods covered by the guaranty.

The person who owns and sells imported goods can make a guaranty for the purpose aforesaid, though the goods may be shipped directly by the firm of whom the guarantor buys them to the customer of the guarantor.

¹ See regulation 9, p. 19, *ante*, and F. I. D. 40, 70, 72, 83, 96, and 99 on guaranties; also F. I. D. 153, May 5, 1914, amending regulation 9.

F. I. D. 63 (Mar. 23, 1907).

USE OF THE WORD "COMPOUND" IN NAMES OF DRUG PRODUCTS.

Many inquiries are received concerning the use of the word "compound" in names of drug products. There seems to be a general impression that this word can be applied as a corrective to many misbranded products. The following extracts serve as examples:

You have on file our formula (active agents—croton oil and cascara), and we would ask if it is possible to call the same "castor pill compound" and comply with the regulations?

This liniment has been in use for forty years. The ingredients, each separately and collectively, are sanitary and highly curative. The one ingredient after which it was named happens to be present in the least proportion. Can not the compound be called by the name "Compound Sassafras Cream?"

An eminent jurist writes:

I shall be glad to know the views entertained by your department as to when a druggist has satisfied this act by a label or printed matter which he puts on the package or bottle in relation to a compound. Take, for example, the product put on the market as Cascarin Compound, or Aloin Compound. I am impressed with the fact that such label must have added a statement as to what the other ingredients of the compound are. This may not mean, and probably does not mean, that the formula must be given or the exact proportions, but a purchaser has the right to know what is in the compound in order to determine for himself, or to receive proper advice, as to whether it is safe to be used.

In no case can a preparation be named after an ingredient or drug which is not present. The word "compound" should not be used in connection with a name which in itself, or together with representations and designs accompanying same, would be construed as a form of misbranding under the act.

It is held that if a mixture of drugs is named after one or more but not all of the active medicinal constituents (not vehicle) present in a preparation, the word "compound" can be used in connection with the name, (a) provided the active constituent after which the product is named is present in an amount at least equal to that of any other active medicinal agent present. Example: If it is desired to make a mixture consisting of oil of sandalwood, balsam copaiba, and castor oil, and call this product "Oil of Sandalwood Compound," the oil of sandalwood should constitute at least $33\frac{1}{3}$ per cent of the entire mixture. Or (b) provided the potent active constituent after which the product is named is present in sufficient amount to impart the preponderating medicinal effect. Example: If a product is named after the active constituent, strychnine, the strychnine or one of its salts should be present in sufficient amount to produce the preponderating medicinal effect of the preparation. Or (c) provided the complete quantitative formula, as outlined in the United States Pharmacopœia and National Formulary, be given on the principal label. A declaration of the complete quantitative formula, however, does not exempt the manufacturer or dealer from giving the information required by the act in the manner prescribed by the regulations. The ounce shall be the unit. The amounts of the ingredients present (excepting alcohol, which is to be stated in per cent) shall be given in grains or minims, and if it is desired the metric equivalent may be given in addition.

F. I. D. 64 (Mar. 29, 1907).

LABELING OF SARDINES.

Many inquiries have been made of this department respecting the extent to which the term "sardine" can be used in food products entering into foreign or interstate commerce. The question of the proper labeling of fish of this kind was submitted by the department to the Department of Commerce and Labor, Bureau of Fisheries. After reviewing the nomenclature and trade practices the Department of Commerce and Labor reached the following conclusion:

Commercially the name sardine has come to signify any small, canned, clupeoid fish; and the methods of preparation are so various that it is impossible to establish any absolute standard of quality. It appears to this department that the purposes of the pure-food law will be carried out and the public fully protected if all sardines bear labels showing the place where produced and the nature of the ingredients used in preserving or flavoring the fish.

In harmony with the opinion of the experts of the Bureau of Fisheries, the Department of Agriculture holds that the term "sardine" may be applied to any small fish described above, and that the name "sardine" should be accompanied with the name of the country or State in which the fish are taken and prepared, and with a statement of the nature of the ingredients used in preserving or flavoring the fish.

It is held that a small fish of the clupeoid family, caught upon or near the shores of and packed in oil in Norway, or smoked and packed in oil, is properly labeled with the phrase "Norwegian Sardines in Oil," or "Norwegian Smoked Sardines in Oil," the nature of the oil being designated. In like manner a small fish of the clupeoid family caught upon or near the shores of and packed in France may be called "French Sardines in Oil," the nature of the oil being specified. Following the same practice, a fish of the clupeoid family caught on or near the shores of and packed in the United States may be labeled "American Sardines Packed in Oil," or "Maine Sardines Packed in Oil," or be given some similar appellation, the nature of the oil being stated. It is suggested that the name of the particular fish to which the term sardine is to be applied should also be placed upon the label—for example, "Pilchard," "Herring," etc.

F. I. D. 65 (Apr. 11, 1907).

THE LABELING OF WHISKY, BLENDS, COMPOUNDS,
AND IMITATIONS THEREOF.¹

The labeling of whisky, blends, compounds, and imitations thereof, under the Food and Drugs Act of June 30, 1906, will be governed by the opinion of the Attorney General, dated April 10, 1907, bearing the approval of the President, published herewith.

THE WHITE HOUSE,
Washington, April 10, 1907.

MY DEAR MR. SECRETARY: In accordance with your suggestion, I have submitted the matter concerning the proper labeling of whisky under the pure-food law to the Department of Justice. I inclose the

¹ Revoked by F. I. D. 113. See F. I. D. 45, 95, 98, 113, 118, 127, on the labeling of whiskeys. See also opinions of the Attorneys General, pp. 775, 783, 797, *post*; Report of the Solicitor General, p. 818, *post*; and Decision of the President, p. 831, *post*, on the same subject.

Attorney-General's opinion. I agree with this opinion and direct that action be taken in accordance with it.

Straight whisky will be labeled as such.

A mixture of two or more straight whiskies will be labeled "Blended whisky" or "whiskies."

A mixture of straight whisky and ethyl alcohol, provided that there is a sufficient amount of straight whisky to make it genuinely a "mixture," will be labeled as compound of, or compounded with, pure grain distillate.

Imitation whisky will be labeled as such.

Sincerely, yours,

THEODORE ROOSEVELT.

HON. JAMES WILSON,
Secretary of Agriculture.

OPINION OF THE ATTORNEY GENERAL.¹

APRIL 10, 1907.

THE PRESIDENT:

SIR: In accordance with your instructions, I have examined the papers referred to me by you, at the suggestion of the Secretary of Agriculture, and herewith submit you my opinion on certain questions which appear from the said papers to have arisen in connection with the labeling or branding of different kinds of spirit, claimed by their manufacturers or proprietors to be entitled to the name of "Whisky," with or without qualifying words. In addition to the papers referred to me by you, I have received and considered a number of other papers submitted to me by various individuals, including Messrs. Hemphill and Worthington and Mr. W. M. Hough, as counsel for certain distillers and rectifiers interested in the questions under consideration, and I have personally gathered some further information which seemed to me material in view of the character of the questions involved.

These questions have arisen in the construction of section 8 of the act approved June 30, 1906, entitled:

An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes,

and generally known as "The pure-food law." The portion of that law bearing upon the points in dispute is section 8, which, so far as material, is as follows:

SEC. 8. That the term "misbranded," as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular. * * * That for the purposes of this act an article shall also be deemed to be misbranded: * * * In the case of food: First. If it be an imitation of or offered for sale under the distinctive name of another article. * * * Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

¹ 26 Op. Atty. Gen., 216.

First. In the case of mixtures or compounds which may be now or from time to time hereafter, known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

Second. In the case of articles labeled, branded, or tagged, so as to plainly indicate that they are compounds, imitations, or blends, and the word "compound," "imitation," or "blend," as the case may be, is plainly stated on the package in which it is offered for sale: *Provided*, That the term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only: *And provided further*, That nothing in this act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding.

Before stating or discussing the particular questions as to which you desire my opinion, I think it will conduce to clearness to call attention to the general purpose of this act and to some considerations founded thereon.

The primary purpose of the pure food law is to protect against fraud consumers of food or drugs; as an incidental or secondary purpose, it seeks to prevent, or, at least, discourage the use of deleterious substances for either purpose; but its first aim is to insure, so far as possible, that the purchaser of an article of food or of a drug shall obtain nothing different from what he wishes and intends to buy. According to the recognized canons of statutory construction, the language of its provisions must be interpreted with reference to and in harmony with this primary general purpose; so that, in determining the proper nomenclature for articles of food as defined in the act, the intention of the law will be best observed by giving to such articles names readily understood and conveying definite and familiar ideas to the general public, although such names may be inaccurate in the view of a chemist or physicist or an expert in some particular industrial art, as in the distillation and refining of spirits. Moreover, the same name may be given by dealers or by the general public to two or more substances varying very materially in their scientific characteristics and this fact must be given due weight in passing upon questions of branding or labeling under the law.

Human experience has associated certain impressions on the senses of taste and smell with the consumption of certain articles of food, and the so-called "flavor" which expresses the resultant of these impressions constitutes a factor of decisive weight in determining the similarity or identity of substances of this character to the mind of the ordinary member of the community, quite irrespective of the relative importance of these chemical or physical properties in the substances which impart this flavor as compared to their other chemical or physical properties. This fact is aptly illustrated by a question considered at much length in the papers referred and also submitted to me as above, namely: "What is Whisky?" A chemist or a distiller might answer this question altogether differently from the ordinary purchaser of whisky for his own consumption; but the purchaser's view of the matter is material to attain the primary purpose of the pure food law; and I think it may be safely said that what he means by "whisky" when buying it is a distilled spirit, fit for use as a beverage and having the particular flavor which human

experience has classified as that of "Whisky." Undoubtedly the flavors of different kinds of spirits all known as "Whisky" differ considerably, and it may be that the general impression of their similarity is due, in some measure, to imagination or imperfect memory; nevertheless, a distinct and definite idea is suggested to the mind by the words "whisky flavor;" this idea is an essential factor in ascertaining the identity of a spirit claimed to be whisky, and, in my opinion, it is the decisive factor in determining the relative weight of the claims of two or more kinds of spirit to the name.

With this preliminary explanation, I proceed to state what I understand to be the questions as to which my opinion is desired. In substance, these are:

First. Under what circumstances should a distilled spirit be labeled or branded "Whisky" without any qualifying words?

Second. Under what circumstances should a liquid be marked a "Blend of whiskies," or "Blended whisky," or "Blended whiskies?"

Third. Under what circumstances should a liquid be marked as a "Compound of whisky," or "Compounded whisky," and what word or words, if any, must be added to such title to make the same appropriate under the law?

Fourth. Under what circumstances, if at all, could a distilled spirit, with additions of coloring and flavoring substances, be termed "Imitation whisky?"

Before dealing directly with these questions, I think it may be well to indicate the application of this law to a class of liquids affording a field for its interpretation with less opportunity for dispute—I refer to wines. It will not be questioned that to be branded or labeled "Sherry," "Port" or "Madeira," a wine must have inherently, and not because any other substance is added to it, the flavor known as that of sherry, port or madeira, as the case may be. There are different kinds of each of these wines; experts can recognize different brands or vintages by their respective flavors, and these flavors vary considerably; nevertheless, there can be no doubt that the sherry, the port and the madeira flavors are distinct from each other, and that each of them has some quality of its own shared by all varieties of the same species of wine.

There is, however, an evident distinction to be drawn between a wine such as sherry, port or madeira, and a wine such as champagne. In the view of a chemist or physicist, champagne would be doubtless described as "a compound," for it consists essentially of a wine, of sugar and of an aerating gas, three substances obviously "unlike." The law, however, in my opinion, does not contemplate that an article should be marked as a "blend," "compound," or "imitation" unless its designation would be otherwise "false or misleading" to the consumer; and the name "Champagne" would indicate to any would-be purchaser, who was ordinarily intelligent and well-informed, a wine artificially sweetened and aerated, or, in other words, a composite substance.

To determine the proper use of the term "Blend" we must first note that the definition of the word in the law is novel and arbitrary. It is thus defined by Webster:

Blend, *n.* A thorough mixture of one thing with another, as colors, liquors, etc.; a shading or merging of one color, tint, etc., into another, so that it cannot be known where one ends or the other begins.

There is nothing in this definition about "likeness" in the substances mingled: this feature is introduced for some special purpose in the law, and the latter must be interpreted so as to give effect to this purpose. To show this more clearly we may also note the same dictionary's definition of "Compound." This is:

Compound, n. That which is compounded or formed by the union or mixture of elements, ingredients, or parts; a combination of simples.

"Compound" and "Blend" are substantially synonymous when applied to mixtures of liquids in ordinary speech, but the pure-food law establishes a distinction of its own between them based upon the character of the ingredients entering into the mixture. In discussing therefore what degree of "likeness" between the mingled substances will justify their designation as a "Blend" it must be always and carefully remembered (1) that "Blend" is meant to be something essentially different from "Compound," and (2) that the subject under consideration is a name for an article of food to be embodied in a label or brand in harmony with the primary purpose of the law as above explained. Without going into metaphysical distinctions, or needless explanations, it is my opinion that effect will be most surely given to the evident intent of this provision of the law if it be held that "Blend," as a substantive, or "Blended," as an adjective, can be properly and legally used in brands or labels under the act of 1906 only when a *single substantive*, either in the singular or in the plural, need follow to appropriately and adequately designate the combination: thus we can speak of a "Blend of Teas" or a "Blended Tea," but not of a "*Blend of Tea and Coffee*." To state the same proposition in different language, I think the two articles mixed must be capable of accurate and sufficient description by a single generic term: they must be substances known by the same name, and that name must be sufficiently distinctive to afford reasonable warning to a purchaser.

If, therefore, the question be what ought to be called "Blend of sherry," or "Blended sherry," or "Blended sherries," I think that such terms could be applied with propriety only to a mixture of two or more sherries, and not to a mixture of sherry with port or with madeira. This is not because "likeness" does not exist between the three kinds of wine mentioned, nor because great similarity may not be found in their chemical composition: it is quite possible that, in the latter respect, some kinds of sherry would be found to have a greater resemblance to some kinds of port than to other kinds of sherry; just as the chemical composition of a diamond might have much greater similarity to that of coal than to that of some other gems; but the term "Blended sherry" could not be appropriate to a mixture of sherry and port; it would mislead an intending purchaser as to the fact that port entered into the combination; the latter might be named with equal propriety "Blended port." On the other hand, if this mixture should be termed a "Blend of port and sherry," there is no distinction in generic designation between a mixture of these two distinct wines and a mixture of two sherries or of two ports, and I think the law clearly intended there should be such a distinction. It might be, perhaps, consistent with the law to call such a mixture "*Blended wines*," but this title would be insufficiently specific; it might designate a mixture of burgundy and

claret as well as one of port and sherry. In my opinion, it is the intent of the act of 1906 that the term "Blended sherry," or "Blend of sherry," or "Blend of sherries" shall designate a mixture of two or more kinds of sherry; while the titles "Compound of port and sherry," or "Compounded port and sherry" would appropriately designate a mixture of two *unlike* substances in the view of the law, namely, two distinct and different kinds of wine; "unlike" just as diamonds and coal are "unlike" substances.

It may be that by diluting neutral spirit (ethyl alcohol) with enough distilled water to reduce it to the normal alcoholic strength of sherry wine, and, by adding appropriate flavoring and coloring substances, a mixture can be produced which tastes and smells and looks like sherry, and when consumed produces substantially the same effects: this mixture, supposing it to contain no article deleterious to health, would be appropriately labeled or branded, under the law, "Imitation sherry." If it were mixed with real sherry, no one would for a moment claim that the two substances thus combined were sufficiently "like" to warrant the description of the resultant as a "Blend;" it could only be accurately labeled, under the law, as a "Compound of genuine and imitation sherries," a designation which would not probably promote its sale.

Applying the same principles to the choice of brands or labels for distilled spirits, and especially for whiskies, we are at once confronted by the question whether whisky corresponds to a wine like sherry or to a wine like champagne; that is to say, whether it is a natural or artificial spirit; meaning by the first term, of course, not that it exists anywhere as a product of nature, but that it is the resultant of the process of distillation alone, without needing any further addition to furnish its characteristic qualities. In the first case, it would be assimilated to brandy or rum; in the second contingency, to gin, since gin is essentially a distilled spirit, frequently as nearly neutral as may readily be, flavored by an infusion of juniper berries. I learn from the papers referred to me that the Department of Agriculture has reached the conclusion that whisky, like brandy and rum and unlike gin, is a natural spirit, its peculiar taste and aroma being imparted to it in the course of distillation and arising primarily from essential oils existing in the substances from which it may be distilled; that is to say, it corresponds to a wine like sherry and not to a wine like champagne. This conclusion seems to be fully warranted by information contained in the papers before me and by such other information as I have been able to obtain; nevertheless, as hereinafter set forth, the statement may, perhaps, need some qualification, or, rather, some explanation. It is doubtful, however, whether the definition of "Whisky" contained in the papers aforesaid, and which I understand to have received the approval of the Department of Agriculture, is quite broad enough to meet the general intent of the law of 1906. This definition I understand to be as follows:

Whisky is a distillate, at the required alcoholic strength, from the fermented mash of malted cereals, or from malt with unmalted cereals, and contains the congeneric substances formed with ethyl alcohol which are volatile at the ordinary temperatures of distillation, and which give the character to the distillate.

In Webster's Dictionary "Whisky" is defined as:

An intoxicating liquor distilled from grain, *potatoes, etc.*, especially in Scotland, Ireland, and the United States. In the United States, whisky is generally distilled from maize, rye, or wheat, but in Scotland and Ireland is often made from malted barley.

In Worcester's Dictionary it is defined as:

A kind of spirit distilled from barley, wheat, rye, maize, *potatoes, etc.*

In Chambers's Encyclopædia of 1875, it is defined as follows:

A spirit made by distillation from grain of any sort and from other materials, as buckwheat, *potatoes and even turnips.*

A large number of similar definitions from standard popular works of reference might be given, and I think there can be no doubt that a spirit generally known and described as "Whisky" is often distilled from potatoes and occasionally from some other substances which could scarcely be correctly classed as cereals. I note this fact because it appears to me contrary to the spirit and subversive of the purpose of the pure food law to adopt a definition which would exclude from the name any substance generally understood by the public to be entitled to it; that is to say, the nomenclature adopted to give effect to the act ought to be, in my opinion, popular and not scientific. This matter, however, is of only subordinate importance in connection with the questions immediately under discussion.

It being admitted that whisky is a natural spirit having certain "congeneric substances," which, in the language of the above definition "give the character to the distillate," it seems obvious that a mixture of two or more different whiskies as thus defined, whether their differences arise from the character of the substances from which they were distilled or from the method of distillation used in each case respectively, or even from their several ages and the environment in which they were kept subsequently to distillation, would be appropriately termed a "Blend of whiskies," or "Blended whisky," or "Blended whiskies;" any one of these three terms would be appropriate, provided that each article entering into the combination, standing alone, would be appropriately designated as "Whisky."

The mixture of a spirit properly designated as "Whisky" with another spirit which, standing alone, would not be properly designated as "Whisky," such as ethyl alcohol, must, in my opinion, be labeled or branded as a "Compound," or as "Compounded." This question has given rise to a very animated dispute, and it is understood that great importance is attached by dealers to its determination, which is thought to involve serious pecuniary loss or gain to some or others among them: I have, therefore, considered it very carefully. In Chambers's Encyclopædia, above quoted, Volume III, article "Distillation," occurs the following passage:

If only alcohol and water passed over in distillation, *all spirits, from whatever extracted, would be the same;* but this is not the case. Brandy, which is distilled from wine, has a peculiar essential oil derived from the grape and also some acid; rum is impregnated with an essential oil from the sugar cane, and with other impurities; malt liquor has the essential oil of barley, etc. It is these essential oils that give to the various spirits their distinguishing flavors. Some of the oils and other impurities are disagreeable and positively noxious, and it is one of the objects of *rectifying* to remove these. The mellowing effects

of age upon spirits is owing to the evaporation, or spontaneous decomposition of the essential oils. Newly distilled spirits are, in general, fiery and specially unwholesome.

This statement from a popular work seems to be fully sustained by works of greater scientific authority and shows, in my opinion, that, for the purposes of the pure food law, neutral spirit or ethyl alcohol, if absolutely pure, would be, not only *like*, but actually *identical*, whether it were derived from fruit, from cereals, from sugar cane, or from any other of the many substances which can furnish alcohol. Inasmuch as a state of *absolute* purity can not be attained by any treatment appropriate for commercial purposes, it may be, perhaps, more nearly accurate to say that each of these different kinds of neutral spirit is a *like* substance to one of any other kind; but, if we concede that ethyl alcohol is a "like substance" to whisky, then we must also concede that brandy and rum are "like substances" to whisky also, because each of them, on precisely the same grounds, can be likened to neutral spirit. It is undoubtedly true that only a very small proportion (less than the half of 1 per cent) of the ingredients entering into whisky are different from those entering into neutral spirit; but this is equally true of brandy and rum, and it is precisely those substances which "give the character to the distillate" in each of these cases.

In the nature of things there can have been, as yet, no judicial decisions as to the meaning of the terms used in the pure food law, but section 3287 of the United States Revised Statutes, as amended in 1879, 1880 and 1899, has been cited to me to show the "likeness" of whisky and neutral spirit as matter of law; I find, however, nothing in that section at all relevant to the present discussion. It requires the cask to indicate "the particular name of such distilled spirits as known to the trade, that is to say, *high wines, alcohol* or *spirits*, as the case may be." It is undoubtedly true that in distillation under the improved methods of modern times a neutral spirit may be produced at a later stage of the process out of something which at an earlier stage of the process was crude whisky or so-called "high wines;" but this no more shows neutral spirit to be a "like substance" to whisky than vinegar is a "like substance" to cider or to wine, or than beef is a "like substance" to veal.

My attention has been likewise called to the case of Taylor Company *v.* Taylor in the Court of Appeals of Kentucky (85 S. W. R., 1085) as establishing the propriety of designating a mixture of whisky and ethyl alcohol as "a blend" or "blended." In this case it was determined that the selling of whisky mixed with neutral spirit under a label which might lead the uninitiated to suppose that it was a "straight whisky" was a fraud upon the public as well as upon the manufacturer of the "straight" article. In its opinion the court says:

The defendant may properly sell his brand of "Old Kentucky Taylor," provided he so frames his advertisements as to show that it is a blended whiskey; but he cannot be allowed to impose upon the public a cheaper article and thus deprive appellant of the fruits of his energy and expenditures by selling his blended whiskey under labels or advertisements which conceal the true character of the article, for this would destroy the value of the appellant's trade.

This decision was rendered on March 17, 1905, more than a year before the approval of the pure food law; in speaking of a mixture of

whisky and neutral spirit as "blended whisky," the court had not, of course, in mind the definition of "Blend" in that law, which, as above noted, is altogether novel and arbitrary; on the other hand, the decision may have been considered by the Congress when it framed the pure food law; and the special and original definition of "Blend" given in that law, may have been intended for the very purpose of making more difficult such frauds as the Court of Appeals in Kentucky condemned in this case.

I conclude, therefore, that according to the true intent of the pure food law, a mixture of whisky with neutral spirit must be deemed a "Compound" and not a "Blend," although the spirit may be a distillate from the same substance used to furnish the whisky, and that such a mixture stands on the same footing as a mixture of whisky and brandy or of whisky and rum.

The definition of "Whisky" as a natural spirit involves as its corollary that there *can* be such a thing as "Imitation whisky." If the same process were followed of which we spoke in connection with artificial wine, namely, if ethyl alcohol, either pure or mixed with distilled water, were given, by the addition of harmless coloring and flavoring substances, the appearance and flavor of whisky, it is impossible to find any other name for the product, in conformity with the pure food law, than "Imitation whisky."

An interesting question remains, the question, in my opinion, of greatest difficulty connected with the subject; namely, whether a mixture of a liquid such as has just been described, or, indeed, a mixture of ethyl alcohol itself with whisky ought to be labeled "Whisky" at all. When the words "Compound" or "Compounded" are used in the act, it is, in my judgment, *ordinarily* necessary, that *two* substances, at least, should be mentioned as entering into the combination described; in other words, it would not be accurate to call a mixture of port and sherry "Compounded sherry" or "Compounded port;" such a mixture must be designated as "Sherry compounded with port" or "Port compounded with sherry" or "Compound of port and sherry." As above stated, this would be, to say the least, no less true if an imitation sherry were used to mix with a genuine sherry, and, at first sight, it would seem that the same reasoning would deny the name "Whisky" to a compound of "straight" whisky and ethyl alcohol whether with or without coloring and flavoring substances. There is, however, a distinction between the two cases, and it is not *universally* true that *two* substantives *must* follow "Compound" or "Compounded," although it is true, in my opinion, that only one substantive can appropriately follow "Blend" or "Blended."

In the first place, we may note that the "Imitation sherry" described above would not be a wine at all, while ethyl alcohol is clearly a spirit; this distinction, however, is not essential. But, so far as I know, no practice exists in the wine trade of mixing port with sherry or genuine with artificial sherry and calling the mixture by the name of either one of its ingredients. On the other hand, there is and has been for a long time in existence a well-known practice of mixing ethyl alcohol with whisky to give the latter an artificial age and thus produce the so-called "mellowness" of old whisky, which is caused by the gradual and partial evaporation of the essential oils contained

in new whisky; and it seems to be a long and well established custom in the trade to call the mixture of whisky and alcohol thus produced "Blended whisky." For the reasons above set forth, I think the law has forbidden the use of the adjective, but it is otherwise with the noun.

In the Encyclopædia Britannica of 1878, Volume VII, under the head "Distillation," there is the following statement:

Flat-bottomed and fire-heated stills are considered the best for the distillation of malt spirit, as by them the flavor is preserved. Coffey's still, on the other hand, is the best for the distillation of grain spirit, as by it a spirit is obtained almost entirely destitute of flavor and of a strength varying from 55 to 70 over proof. Spirit produced of this high strength evaporates at such a low temperature that scarcely any of the volatile oils on which the peculiar flavor of spirits depends are evaporated with it, hence the reason why it is not adapted for the distillation of malt whiskey which requires a certain amount of these oils to give it its requisite flavor. The spirit produced by Coffey's still is, therefore, chiefly used for making gin and factitious brandy by the rectifiers, *or for being mixed with malt whiskies by the wholesale dealers.*

The practice therein described has become during the past twenty-eight years much more general than it then was, in the United States as well as in Great Britain, and improvements in the art of distillation have rendered it much easier and more profitable.

As above explained, I consider "Champagne" a suitable label or brand for the composite wine known by that name. If a natural wine existed which was sweet and sparkling and also generally known as "Champagne," a mixture of the two might be, I think, appropriately called "Compound" or "Compounded champagne," and, in accordance with this analogy, I conclude that a combination of whisky with ethyl alcohol, supposing, of course, that there is enough whisky in it to make it a *real* compound and not the mere semblance of one, may be fairly called, "Whisky;" provided the name is accompanied by the word "Compound" or "Compounded," and provided a statement of the presence of another spirit is included in substance in the title. I am strengthened in this conclusion by understanding from the papers you have referred to me that it has been reached by the Department of Agriculture as well.

The following seem to me appropriate specimen brands or labels for (1) "straight" whisky, (2) a mixture of two or more "straight" whiskies, (3) a mixture of "straight" whisky and ethyl alcohol, and (4) ethyl alcohol flavored and colored so as to taste, smell, and look like whisky:

(1) Semper Idem Whisky: A pure, straight whisky mellowed by age.

(2) E Pluribus Unum Whisky: A blend of pure, straight whiskies with all the merits of each.

(3) Modern Improved Whisky: A compound of pure grain distillates, mellow and free from harmful impurities.

(4) Something Better than Whisky: An imitation under the pure food law, free from fusel oil and other impurities.

In the third specimen it is assumed that *both* the whisky and the alcohol are distilled from grain.

I remain, sir, yours very respectfully and truly,

CHARLES J. BONAPARTE,
Attorney General.

F. I. D. 66 (Apr. 15, 1907).

THE USE OF SUGAR IN CANNED GOODS.¹

Numerous inquiries have been addressed to the department respecting the proper labeling of canned fruits and vegetables to which sugar has been added. Sugar is a wholesome food product, and is also condimental. It reveals its own presence by its taste. Its addition to a food product can not be objected to on the ground of injury to health.

It is held by this department that sugar can be used in the preparation of all food products where it is not used for fraudulent purposes. If sugar be added without notice to Indian corn which is not sweet, for the purpose of making it appear a sweet corn, to be sold as such, it is used for a fraudulent purpose, and for this reason is prohibited by the law.

In section 7 of the law it is provided that a food is adulterated "if it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed." It is evident, therefore, that a food product can not be mixed with any other substance for the purpose of concealing damage or inferiority. A vegetable which is not naturally sweet could not be sold as one which is naturally sweet by mixing with sugar without violation of the law, unless the addition of sugar is plainly indicated on the label.

The addition of sugar to canned vegetables is not for preservative purposes. Added sugar increases the tendency to fermentation. It is added wholly as a condimental ingredient.

It is held, therefore, that the addition of sugar to a substance not naturally sweet, converting it into a substance which might seem naturally sweet, is justified if the label plainly indicates that this sweetening material is added. In other cases, where no deception is practiced, the mention of the presence of sugar is not required.

The term "sugar," as used herein, is confined to sucrose (saccharose), either in a solid form or in solution.

F. I. D. 67 (April 15, 1907).

POLISHING AND COATING RICE.²

It has been represented to the department that it is a very common practice in this country in the preparation of rice for commerce to treat it in the following manner:

1. The rough rice is passed through a set of stones, or shellers, which removes the hull.

2. The product is subjected to a series of scouring machines by which the bran and cuticle are removed.

3. The rice is passed through a machine that is known as the brush, which removes a portion of the flour, or more commonly known as polish.

4. The rice is introduced into a warm revolving drum or cylinder holding often as much as 4,000 pounds, and glucose and talc are added in the following manner and in about the following proportion: As the rice is fed into the drums a small proportion of glucose and talc are applied, namely, glucose one one-thousandth and talc one three-thousandth part of the whole. The object of the glucose is to form a coating by means of which a part of the talc is held on the surface of the rice.

¹ See F. I. D. 144 on the use of water, brine, syrup, sauce and similar substances in the preparation of canned foods.

² See F. I. D. 123 on the labeling of rice.

It is stated that the rice is coated for the following reasons:

1. The coating makes the rice less susceptible to dust and other foreign matter during transportation and storage.
2. It is, in a measure, a preventive against the attack of the weevils and worms which are so destructive in warm climates.

It has also been represented that in some instances paraffin is used instead of glucose and that rice starch is sometimes used in place of talc for the purpose of finishing rice according to the method described above.

In submitting these representations it has been asked if the process above described is permitted under the Food and Drugs Act of June 30, 1906. It is not clear to the department that coating rice in this way protects it in any manner from dust. Evidence of an expert character is also on file in the department showing that unpolished rice is no more subject to the ravages of the weevil than the polished article.

It is the opinion of the department that no coating of any kind can be used in the manner indicated if the product "be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed." In each case whether or not such a result be secured is a question of fact to be decided by the evidence.

It is held by the department that rice treated in the manner indicated above with glucose and starch should be labeled in all cases with the name of the extraneous substances, as

"COATED WITH GLUCOSE AND STARCH."

In such declarations all of the food substances used for coating should be mentioned. Any coloring matter or other substances that may be employed to change the tint of the rice should be declared on the label.

The question of the wholesomeness of paraffin, talc, or other non-food substances used is to be construed in such a way as to protect the health of those most susceptible to their influences. Rice is a diet often prescribed for those suffering from impaired digestion. The use of paraffin in such cases is at least of questionable propriety, and in the opinion of the department it should be excluded from food products. Under the fifth provision of foods, section 7 of the Food and Drugs Act, June 30, 1906, and under Regulation 14 the use of talc is permitted, provided that each package be plainly labeled with the name of this preservative and the proper directions for removal be given.

F. I. D. 68 (April 18, 1907).

LABELING OF FOOD AND DRUG PRODUCTS "MANUFACTURED FOR," "PREPARED FOR," "DISTRIBUTED BY," ETC.

Numerous inquiries are received relative to the marking of products not manufactured by the party in whose name they are sold. The following are representative:

We prepare products on the special prescription of the customer, shipping the same to him in barrels to be rebottled, labeled, and packed for the market. Many of our customers are asking how the law affects this business.

Manufacturing chemists ship goods to us, made according to our formula; we bottle and label the goods. Should our name appear on the labels as manufacturers or distributors? All of our remedies are given a distinctive name.

If we put up a cough remedy for John Smith & Co., would it be sufficient to label it "Sold by," or must it be labeled "Prepared for John Smith & Co."?

Will it be necessary to have appear on the label our name as the actual manufacturer of the product or will it only be necessary that the words "Prepared only by" be cut out of the label and instead the words "Prepared for" be printed thereon, just before the name of the Blank Chemical Company? You will, we think, appreciate that, as the preparation is made over their private formula and for their account, we acting merely as the agent for this manufacturer, we should not care to have our name attached to it or to any other preparation of this kind put out by another concern and should be obliged to discontinue the business entirely should it be required that our name appear on the labels for this preparation.

I would respectfully call your attention to the injustice the enforcement of regulation 18 (a) of Circular 21 will be to manufacturers of plain unmixed food products like sweet corn or tomatoes. This regulation enables jobbers to demand that their names be placed on the labels to the exclusion of that of the manufacturer and to enforce their demand. The remedy is a simple one and seems to be wholly within the intent of the law, viz, require that the name of manufacturer and place of manufacture be put upon every package offered for sale, and that it be held misbranded if this is not the conspicuous feature of all labels on all packages of food, whether plain, mixed, or compounded.

In considering the above inquiries it should be borne in mind that the law forbids all forms of misrepresentation. Food mixtures and compounds having "distinctive names" must in all cases bear the name of the place of manufacture. No drug products, whether simple, mixed, or compounded, with or without "distinctive names," are required to bear the name of the manufacturer or producer, or the place where manufactured or produced, except when sold under proper name brands, i. e., brands in which both the given name and the surname are used. All food and drug products sold under such proper name brands should bear the name of the manufacturer or producer and the place of manufacture or production. In all cases where the name of party or place is stated upon the label such name must be the true name of the actual manufacturer, producer, or packer and the true name of the place where the article was manufactured, produced, or packed.

If, for trade reasons, when not required by law, a name or a place be given upon the label of foods or drugs manufactured or packed for any person, firm, or corporation by another person, firm, or corporation, one of two forms of labels is allowed, viz:

(a) The name of the actual manufacturer or packer and the place where the goods were actually manufactured or packed may be given, or

(b) The name of the person, firm, or corporation for whom the goods are manufactured or packed or by whom they are distributed may be given, if preceded by the words "Prepared for," "Manufactured for," "Distributed by," etc. The phrase "Sold by" is not satisfactory. The approved phrase shall be set in type not smaller than 8-point (brevier) caps.

This rule holds even if the formula or prescription be furnished or owned by the parties for whom the goods are manufactured or packed.

Foods and drugs repackaged within a State and sold only within that State are not subject to the Federal law; but repackaged foods or drugs which enter interstate commerce or which are sold in the District of Columbia or in the Territories are subject to the law and should be labeled in accordance with this decision.

F. I. D. 69 (May 14, 1907).

INSPECTION OF FOOD AND DRUGS AND IDENTIFICATION OF INSPECTORS.

In connection with the enforcement of the Food and Drugs Act, June 30, 1906, inspectors of the Bureau of Chemistry will visit establishments in which food and drug products are manufactured, stored, or sold. They will make report to the Bureau regarding conditions of manufacture and will take samples wherever it is desired, paying the regular prices for such samples.

In case the report of the inspector, or the examination of the sample taken by him, discloses a violation of the law, no action will be taken until the dealer or manufacturer has been notified and afforded a hearing before the Board of Food and Drug Inspection. The preliminary hearing in each case may be held before the chief of the laboratory making the examination. In case of an adverse decision the recommendation of the chief of the laboratory, together with a digest of the testimony, must be submitted to the Board of Food and Drug Inspection for final action.

According to regulation 5 (a)—

The parties interested therein may appear in person or by attorney and may propound proper interrogatories and submit oral or written evidence to show any fault or error in the findings of the analyst or examiner.

It is held that the interested parties need not necessarily appear in person or by attorney, but, instead, may submit a brief to the Board of Food and Drug Inspection stating their side of the case.

If the results of the inspection and examination indicate that the law has not been violated, or if it is believed by the department that prosecution is unwarranted because of irregularity of sample, or for other reason, the dealer will be notified that no further action will be taken with reference to that sample.

No information will be given in any case by an inspector or branch laboratory of the Bureau of Chemistry regarding the report of an inspection of a factory or the result of an analysis. No statement will be made at any time except as mentioned above regarding the analysis of a sample that is found to be in accordance with the law. No certificate of analysis will be given, and no report other than the notice of a violation of the law referred to above. *Requests for reports upon samples taken will be answered by a copy of this decision.*

The following form for the identification of inspectors has been adopted:

UNITED STATES DEPARTMENT OF AGRICULTURE,
Washington, D. C., _____, 190

This is to certify that _____, whose photograph appears opposite, is authorized to inspect establishments manufacturing and dealing in food and drugs and products entering into their manufacture, under the food and drugs act, June 30, 1906.

This authorization expires _____
(Date)

(Secretary)

In addition to the above, the form includes a photograph of the inspector, the whole bound in a stiff cover.

F. I. D. 70 (May 14, 1907).

ABUSE OF GUARANTY FOR ADVERTISING PURPOSES.¹

The attention of the department has been called repeatedly of late to the abuse, for advertising purposes, of the serial number assigned to a guaranty. The Department of Agriculture accepts no responsibility for the guaranty which the manufacturer or dealer files. Particular attention must be paid to the fact that it must neither be directly stated nor implied in any fashion that the Department of Agriculture or the United States Government guarantees or indorses the products to which the guaranty and serial number are attached. *The guaranty represented by the serial number is the guaranty of the manufacturer and not of the Government.*

To facilitate business a serial number is assigned to this guaranty, and the guaranty is filed in the Department of Agriculture for the purpose of verifying the serial number when it is used on packages of goods.

The misuse of the serial number is a misrepresentation, and in each case of such an abuse the serial number will be withdrawn and the guaranty returned after proper notice. Serial numbers, however, which have been issued and passed into commerce prior to withdrawal will be respected by the department in any action which may be brought against dealers selling goods bearing the number which is improperly used.

The attachment of the serial number or guaranty to articles which are not foods or drugs is also regarded as a misrepresentation on which a similar action will be based.

F. I. D. 71 (May 14, 1907).

LABELING OF SUCCOTASH.

A manufacturer writes as follows:

We respectfully call your attention to the canned article known as succotash, which is composed of green sweet corn and lima beans. Both dried and green beans are used. The question to which we desire an answer is this: Is it sufficient to call the product "SUCCOTASH"?

The word "succotash," if used without qualification, is understood to imply that the product designated is composed of green sweet corn and green beans. If soaked beans or soaked corn (i. e., dried beans or corn softened in water) are employed, the name should be accompanied by declaration of that fact, such declaration to be in type not smaller than 8-point (brevier) capitals.

F. I. D. 72 (May 17, 1907).

USE OF GUARANTIES AND SERIAL NUMBERS THEREOF.¹

A misapprehension exists as to the requirements of the regulations for the enforcement of the food and drugs act, June 30, 1906, in regard

¹ See regulation 9, p. 19, *ante*, and F. I. D. 40, 62, 72, 83, 96, and 99 on guaranties; also F. I. D. 153, May 5, 1914, amending regulation 9.

to placing the serial number on articles manufactured by persons who have filed a guaranty with the department and to whom a serial number has been issued identifying the said guaranty. Many have the impression that if a guaranty be filed the serial number which is assigned thereto must be used on all foods or drugs manufactured by them.

Regulation 9 provides two general methods of guaranty. The first is described in subdivision (b) of regulation 9, as follows:

(b) A general guaranty may be filed with the Secretary of Agriculture by the manufacturer or dealer and be given a serial number, which number shall appear on each and every package of goods sold under such guaranty with the words, "Guaranteed under the food and drugs act, June 30, 1906."

The second is described in subdivision (d) of regulation 9, as follows:

(d) If the guaranty be not filed with the Secretary of Agriculture as above, it should identify and be attached to the bill of sale, invoice, bill of lading, or other schedule giving the names and quantities of the articles sold.

The statement in subdivision (b), that when a guarantor is assigned a serial number the said number *shall* appear, should not be construed as mandatory. The meaning is that if a manufacturer wishes to make effective the guaranty filed with the department, he must place the legend and serial number on his goods, otherwise no protection is afforded to his customers in the absence of a special agreement or the alternative as provided in subdivision (d) of regulation 9.

Regulation 9, in its entirety, is intended to provide for the enforcement and administration of section 9 of the food and drugs act, which reads as follows:

SEC. 9. That no dealer shall be prosecuted under the provisions of this act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this act, designating it. Said guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines, and other penalties which would attach, in due course, to the dealer under the provisions of this act.

A study of the law in connection with the regulations makes it apparent that the intention is to provide a means whereby the manufacturer can assume responsibility under the law for the character of the goods manufactured by him, after they have passed out of his possession into the hands of the person who purchased them from him. In no case is a guaranty a good defense, unless it be from the person who sold the goods to the person offering the guaranty as a defense.¹ In order to simplify the procedure, the department volunteers to act as custodian of the guaranty, which is an offer on the part of the manufacturer to free dealers, reselling his goods, from responsibility, under the law, for possible misbranding or adulteration. In order that the guarantor may convey this intention on his part to purchasers of his goods, a serial number is assigned to such guarantor, and by placing this number on his goods he fixes his responsibility. Whether he desires to enter into an agreement of this kind with the

¹ But see opinion of the Attorney General published in F. I. D. 83.

purchaser of his goods is a matter wholly within his discretion, and he can use the serial number or not for this purpose, as he may please. The use of the number will save the trouble of individual guaranties with each individual transaction or each individual customer. In other words, the label itself will carry notice that the manufacturer holds himself responsible, under the law, to the persons who purchase goods directly from him, for any misbranding or adulteration.

F. I. D. 73 (May 21, 1907).

INTERSTATE TRANSPORTATION OF IMPORTED MEATS AND MEAT-FOOD PRODUCTS.

Regulation 64 of the Regulations Governing the Meat Inspection of the United States Department of Agriculture (Amendment No. 10 to B. A. I. Order No. 137) provides as follows:

Imported meats and meat-food products which have not been mixed or compounded with or added to domestic meats may be transported by any common carrier from one State or Territory or the District of Columbia to any other State or Territory if the packages containing them shall be marked "Inspected under the Food and Drugs Act, June 30, 1906," and are so marked when received for transportation.

It is held that packing cases, boxes, or other coverings containing imported meats or meat-food products in the original true containers which have not been mixed or compounded with or added to domestic meats may be marked with the legend "Inspected under the Food and Drugs Act, June 30, 1906," by the shipper. *The interstate transportation under this legend of domestic meats and meat-food products or of imported meats and meat-food products which have been mixed or compounded with or added to domestic meats will subject both the shipper and the carrier to heavy penalties.*

F. I. D. 74 (July 1, 1907).¹

CERTIFICATES FOR IMPORTED MEATS AND MEAT-FOOD PRODUCTS OF CATTLE, SHEEP, SWINE, AND GOATS.

The following inquiry has been received regarding certificates for imported meats required by regulation 32:

We respectfully beg to submit a letter from Messrs. _____ of _____, from whom we have been importing small quantities of canned meats, consisting principally of meat balls, preserved game in cans, etc.

There being no inspector who could certify invoices for canned meats, we of course can not import these goods any more. We would respectfully ask if a certificate as to purity, by the manufacturer, would not answer the purpose in this special case, there being no one in _____ to officially certify.

The meat-inspection law of June 30, 1906, forbids the transportation in interstate or foreign commerce of the meat or meat-food products of cattle, sheep, swine, and goats which are diseased, unsound, unhealthful, unwholesome, or otherwise unfit for human food. Meat or meat-food products of those animals to which has been added any

¹ See F. I. D. 116 amending this decision.

substance which lessens wholesomeness, or any drug, chemical, or harmful dye or preservative, other than common salt, sugar, wood smoke, vinegar, pure spices, and saltpeter, may not be transported in interstate or foreign commerce. The law further requires the ante-mortem and post-mortem inspection of the animals which furnish meat and meat-food products for interstate or foreign commerce. All these requirements are based on the principle that uninspected meats of this character may be dangerous to health.

The Food and Drugs Act of June 30, 1906, provides that a product which does not comply with the provisions of the act "or is otherwise dangerous to health" shall be denied the right of importation. It is held, therefore, that, except as hereinafter provided, imports of meat or meat-food products of cattle, sheep, swine, and goats shall be subject to the same restrictions as meats of domestic origin. Such meats and meat-food products shall be accompanied by certificates showing their freedom from disease, or entry into the United States will be denied. For entry of meat or meat-food products of animals other than cattle, sheep, swine, and goats, including fish, only the declaration required for foods other than meats is necessary.

The certificate shall be that of an official inspector of the country, district, or city in which the meat is manufactured. It shall be specified in the certificate that the animals from which the meat or meat-food products which are covered by the certificate are derived were inspected before and after slaughter and were found to be in a healthy condition (see regulation 32); that the animals furnishing the meat or meat-food products are cattle, sheep, swine, or goats, as the case may be; and that the meat or meat-food products covered by the certificate have been mixed with the meat of no other animal.

The official inspector who signs the certificate shall have his authority viséed before the United States consul. One authorization of this kind will be sufficient for all shipments signed by the same inspector, and it will not be necessary to furnish a new authorization unless a new inspector signs the certificate.

The following are acceptable forms of certificates:

1. I hereby certify that the shipment of [kind of meat] consigned by _____ to _____ and designated by [distinguishing marks] is the product of [kind of animals] which by ante-mortem and post-mortem veterinary inspection were shown to be free from disease and suitable for food, and that the meat has not been treated with chemical preservatives or other foreign substance injurious to health.

2. I hereby certify that the meat-product factory of the firm of _____ is located in the meat-inspection district of the province of _____; that the animals killed in that establishment are subjected to competent official veterinary ante-mortem and post-mortem inspections; that all of the meat sold by that firm is the product of animals free from disease; and that all meat and meat-food products of that firm are free from chemical preservatives or other foreign substances injurious to health.

The certificate mentioned above will not take the place of port inspection as to the condition of the shipment on arrival, whether it is fit for human food, whether it is infected with vermin, or whether it contains any of the substances forbidden by the regulations for the enforcement of the meat-inspection law. This port inspection will be made by the inspectors of the Bureau of Chemistry, and if the meat or meat-food product be found not to conform to the law, the shipment will be rejected even if the certificate be in due form.

Stearin, for mixture with domestic oils, not animal, may be admitted without certificate, if the importer executes a penal bond conditioned upon the subsequent export of all stearin thus imported.

Meat and meat-food products of horses and dogs will not be allowed entry into the United States.

F. I. D. 75 (July 5, 1907).

THE LABELING OF MIXTURES OF CANE AND MAPLE SIRUPS.¹

The director of the agricultural experiment station at Orono, Me., in a recent letter made the following statement:

There are in Maine many sirups which are labeled something like this: "A Fancy Quality Sirup Made from Pure Maple and White Sugar." Many of these sirups carry but little maple, one company saying that in a sirup analogous to this they put 90 per cent of cane sugar and 10 per cent of maple.

When both maple and cane sugars are used in the production of sirup the label should be varied according to the relative proportion of the ingredients. The name of the sugar present in excess of 50 per cent of the total sugar content should be given the greater prominence on the label; that is, it should be given first. For example, a sirup the sugars of which consist of 51 per cent cane sugar and 49 per cent maple sugar would be properly branded as "Sirup Made from Cane and Maple Sugar," or as "Cane and Maple Sirup." The terms "maple sugar" and "maple sirup" may only be used on the label as part of the name when those substances are present in substantial quantities as ingredients. They should not appear on the label as part of the name when only a small quantity of those substances is used to give a maple flavor to the product. A cane sirup containing only enough maple sirup or maple sugar to give a maple flavor is properly labeled as "Cane Sirup, Maple Flavor" or "Cane Sirup Flavored with Maple."

Whenever it is necessary to declare cane sugar (sucrose) on a label it should be declared as cane sugar and not as white sugar.

F. I. D. 76 (June 18, 1907).²

DYES, CHEMICALS, AND PRESERVATIVES IN FOODS.³

It is provided in regulation 15 of the rules and regulations for the enforcement of the Food and Drugs Act, that the Secretary of Agriculture shall determine by chemical or other examination those substances which are permitted or inhibited in food products; that he shall determine from time to time the principles which shall guide the use of colors, preservatives, and other substances added to foods; and that when these findings and determinations of the Secretary of Agriculture are approved by the Secretary of the Treasury and the Secretary of Commerce and Labor, the principles so established shall

¹ See *In re Wilson*, p. 186, *post*; *United States v. John A. Tolman & Co.*, p. 231, *post*; and *United States v. Boeckmann*, p. 242 *post*.

² Approved by the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor. See also F. I. D. 89.

³ For other decisions on the use of benzoate of soda in foods see F. I. D. 89, 101, and 104. See also F. I. D. 77, 106, and 117 relative to the use of colors in foods.

become a part of the rules and regulations for the enforcement of the Food and Drugs Act.

The law provides that no food or food product intended for interstate commerce, nor any food or food product manufactured or sold in the District of Columbia or in any Territory of the United States, or for foreign commerce, except as thereafter provided, shall contain substances which lessen the wholesomeness or which add any deleterious properties thereto. It has been determined that no drug, chemical, or harmful or deleterious dye or preservative may be used. Common salt, sugar, wood smoke, potable distilled liquors, vinegar, and condiments may be used. Pending further investigation, the use of saltpeter is allowed.

Pending the investigation of the conditions attending processes of manufacture, and the effects upon health, of the combinations mentioned in this paragraph, the Department of Agriculture will institute no prosecution in the case of the application of fumes of burning sulphur (sulphur dioxid), as usually employed in the manufacture of those foods and food products which contain acetaldehyde, sugars, etc., with which sulphurous acid may combine, if the total amount of sulphur dioxid in the finished product does not exceed 350 milligrams per liter in wines, or 350 milligrams per kilogram in other food products, of which not over 70 milligrams is in a free state.¹

No prosecutions will be based on the manufacture, sale, or transportation of foods and food products manufactured or packed during the season of 1907 which contain sodium benzoate in quantities not exceeding one-tenth of 1 per cent, or benzoic acid equivalent thereto, provided sodium benzoate or benzoic acid has hitherto been generally used in such foods and food products.

The label of each package of sulphured foods, or of foods containing sodium benzoate or benzoic acid, shall bear a statement that the food is preserved with sulphur dioxid, or with sodium benzoate, or benzoic acid, as the case may be, and the label must not bear a serial number assigned to any guaranty filed with the Department of Agriculture nor any statement that the article is guaranteed to conform to the Food and Drugs Act.

The use of any dye, harmless or otherwise, to color or stain a food in a manner whereby damage or inferiority is concealed is specifically prohibited by law. The use in food for any purpose of any mineral dye or any coal-tar dye, except those coal-tar dyes hereinafter listed, will be grounds for prosecution.² Pending further investigations now under way and the announcement thereof, the coal-tar dyes hereinafter named, made specifically for use in foods, and which bear a guaranty from the manufacturer that they are free from subsidiary products and represent the actual substance the name of which they bear, may be used in foods. In every case a certificate that the dye in question has been tested by competent experts and found to be free from harmful constituents must be filed with the Secretary of Agriculture and approved by him.

The following coal-tar dyes which may be used in this manner are given numbers, the numbers preceding the names referring to the number of the dye in question as listed in A. G. Green's edition of the

¹ See F. I. D. 89 on the use of sulphur dioxid in foods.

² See regulation 15, p. 21, *ante*.

Schultz-Julius Systematic Survey of the Organic Coloring Matters, published in 1904.

The list is as follows:

Red shades:

- 107. Amaranth.
- 56. Ponceau 3 R.
- 517. Erythrosin.

Orange shade:

- 85. Orange I.

Yellow shade:

- 4. Naphthol yellow S.

Green shade:

- 435. Light green S. F. yellowish.

Blue shade:

- 692. Indigo disulfoacid.

Each of these colors shall be free from any coloring matter other than the one specified and shall not contain any contamination due to imperfect or incomplete manufacture.

The question of the entry into the United States of vegetables greened with copper salts has not been finally determined. Pending the determination and decision of this matter by the Secretary of Agriculture, all vegetables greened with copper salts which do not contain an excessive amount of copper will be admitted to entry if the label bears a statement that sulphate of copper or other copper salts have been used.¹

This food inspection decision is to be construed in connection with regulations 14 and 31 of the Rules and Regulations for the Enforcement of the Food and Drugs Act. Regulation 14 provides that poisonous and deleterious preservatives shall only be applied externally, and the preservatives in food products shall be of a character which shall not permit the permeation of any preservative to the interior, or any portion of the interior, of the product. It further provides that the preservative must be of such a character that, until removed, the food products are inedible, and that when these products are ready for consumption if any portion of the added preservative shall have penetrated the food product, the said food product shall then be subject to the regulations for food products in general.

Regulation 31 provides that food products intended for export may contain added substances not permitted in foods intended for interstate commerce, when the addition of such substances does not conflict with the laws of the country to which the food products are to be exported, and when such substances are added in accordance with the direction of the foreign purchaser or his agent.

No prosecution will be based on the sale of foods and food products manufactured or packed in the United States prior to the issuing of this decision, where the composition of such foods and food products is at variance with the requirements of this decision, if the nature of the variation be plainly stated on the label. In every case, however, the burden of proof will be on the manufacturer to show that the goods were manufactured or packed prior to the date of this decision.

¹ See F. I. D. 92, 102, 148 and 149 on greenening foods with copper salts.

MEMORANDUM TO ACCOMPANY FOOD-INSPECTION DECISION 76, ON DYES, CHEMICALS, AND PRESERVATIVES.¹

I. PROHIBITION OF PRESERVATIVES.

Section 7 of the Food and Drugs Act, June 30, 1906, provides that, for the purposes of the act, an article shall be deemed to be adulterated in the case of food if it contain any added poisonous or other deleterious ingredient which may render such article injurious to health. The decision states that it has been determined that no drug, chemical, or harmful or deleterious dye or preservative may be used in the preparation of food and food products. The board was influenced in framing this portion of the decision by the following considerations:

Among those substances added in greater or less amounts to food and food products for the purpose of coloring or of inhibiting bacterial action are those chemical substances which may be classed generically as dyes and preservatives. It is clearly the intent of the food and drugs act to inhibit the use of these substances as well as any others which are poisonous and deleterious to health. Whether or not dyes and preservatives are harmful is a matter which can only be determined by experimental evidence, and both classes have been subjected to investigation with the main idea of determining this point. Not only have investigations been conducted by many leading experts in this and other countries, but extended investigations have been instituted by the Department of Agriculture.

The classes of substances which have been investigated by the Department of Agriculture include essentially all of the well-known preservatives, including such types as boracic acid and borax, salicylic acid and its salts, benzoic acid and its salts, sulphurous acid and its salts, and formaldehyde.

The evidence which has accumulated as the result of all these researches conducted in the Department of Agriculture, as well as the result obtained as the outcome of other researches, both in the United States and abroad, points so strongly to the poisonous properties of preservatives that their use as a class should under the act be inhibited in foods and food products.

In order to obtain the views of eminent physiologists and hygienists, health officers, and physicians in the United States as to the propriety of using preservatives in foods, a list of questions was sent out from the Department of Agriculture, to which a large number of replies was received. These questions and the replies have been tabulated as follows:

1. Are preservatives, other than the usual condimental preservatives, namely, sugar, salt, alcohol, vinegar, spices, and wood smoke, injurious to health?

Affirmative	218
Negative	33
Total	251

2. Does the introduction of any of the preservatives which you deem injurious to health render the foods injurious to health?

Affirmative	222
Negative	29
Total	251

¹ Signed by the Board of Food and Drug Inspection.

3. If a substance added to food is injurious to health, does it become so when a certain quantity is present only, or is it so in any quantity whatever?

Affirmative	169
Negative	79
Total	248

4. If a substance is injurious to health, is there any special limit to the quantity which may be used which may be fixed by regulation or by law?

Affirmative	68
Negative	183
Total	251

5. If foods can be perfectly preserved without the addition of chemical preservatives, is their addition ever advisable?

Affirmative	12
Negative	247
Total	259

It can readily be seen from this tabulation that the opinions expressed point overwhelmingly to the fact that preservatives as a class are injurious to health, and hence their use is, under the act, inhibited.

II. USE OF SULPHUR FUMES PERMITTED IN CERTAIN CASES.

The decision further provides that pending investigation of processes of manufacture and of effect upon health, the Department of Agriculture will institute no action where the fumes of burning sulphur are used in the manufacture of foods and foodstuffs containing acetaldehyde, sugars, etc., with which the sulphur dioxide may combine, but the decision limits the total amount of sulphur dioxide in a liter of wine, or a kilogram of other food products, to 350 milligrams, and further provides that only 70 milligrams of this may be in a free state; the residual sulphur dioxide must be in combination with the acetaldehyde, sugars, etc.

While it is true that sulphurous acid and its salts belong to the class of preservatives which are prejudicial to health, and in consequence their use is inhibited, yet with respect to sulphur dioxide, under certain conditions of use (as in the sulphuring of wine casks in the preparation of wine, in the preparation of evaporated or dried fruits, in the manufacture of certain sugars, etc.), it is rendered more or less inert. There is evidence to show that when sulphur dioxide is used as above indicated it combines, for example, with the acetaldehyde of the wine, thus forming a compound (so-called aldehyde-sulphurous acid) which is relatively harmless. In dried fruits in the preparation of which sulphur dioxide has been used there is reason for believing that it may all be present in this so-called "combined" condition, probably to a large extent, if not wholly, in combination with the sugars present. There is also reason for believing that sulphur dioxide may combine with protein and cellulose, but probably all of these "combined" forms are not equally inert from a physiological point of view.

The evidence is not sufficiently conclusive to condemn at present the use of sulphur dioxide under those conditions in which it may be present in this combined form, but it is necessary to limit its presence in such cases so as to avoid the presence of excessive quantities of free sulphurous acid, the toxic effect of which is marked.

The limit in food products has been set at 350 milligrams of total (that is, both free and combined) sulphur dioxide per liter, or kilogram, with an allowance of not over 20 per cent of this amount in a free state. This standard has been reached by a study of a large number of analyses of typical samples of food products which were obtained either in the open market or at ports of entry. That the use of sulphur dioxide in the preparation of wines, evaporated fruits, molasses, etc., has in some cases been greatly abused is apparent from a study of these analyses. To illustrate this point the following analyses of evaporated and dried fruits, purchased in the open market, are given:

	Milligrams of sulphur dioxide per kilo.
Dried peaches.....	3, 072
California apricots.....	2, 842
Evaporated apricots.....	1, 792
Dried apples.....	1, 419
Evaporated apples.....	1, 738

Especially is this abuse apparent when a comparison is made with other samples, likewise obtained in the open market.

	Milligrams of sulphur dioxide per kilo.
Evaporated raisins.....	225
Evaporated apricots.....	190
Evaporated apples.....	4. 5
Evaporated apples.....	3. 3
California prunes.....	3. 3
Dried apples.....	6. 6
Dried apples.....	9
Fancy cleaned currants.....	4. 5

Other figures might be quoted to show that very wide variations exist in the total amount of sulphur dioxide found in this class of foods, but these few are sufficient to illustrate the point that there is no "commercial necessity" for the existence of sulphur dioxide in the very large amounts shown in the first set of analyses, and in order to protect the public and minimize any possible danger that might arise from undue sulphuring it is necessary to restrict the use of sulphur dioxide within the limits suggested in the accompanying food inspection decision.

The limit of 350 milligrams of sulphur dioxide is also exceeded in a few samples of molasses on the market to-day. Molasses has been found containing as much as 1,395 milligrams of sulphur dioxide per kilogram. Such cases of undue sulphuring are comparatively rare, and the results of many analyses show that in this class of foodstuffs the sulphur dioxide may by care be reduced to amounts wholly within the limits set.

The following analyses show the amount of sulphur dioxide usually found in molasses and the ordinary variations to which it is subject.

	Milligrams of sulphur dioxide per kilo.
New Orleans molasses.....	None.
New Orleans molasses.....	310
New Orleans molasses.....	155
B. and O. brand, New Orleans molasses and corn sirup.....	25
Porto Rico molasses.....	8
New Orleans molasses.....	211
Magnolia brand.....	100
Rockwood molasses (New Orleans).....	359

In the manufacture of wines it is usually considered that the need for sulphur dioxide is greatest in the nonfortified sweet wines, and in general it may be said that the larger the amount of sugar present the greater is the amount of sulphur dioxide used, but such a rule is by no means universal, illustrating the fact that in sound wines the use of sulphur dioxide is often carelessly controlled and no special pains taken to limit the amount to the quantity necessary to achieve the purpose for which it is used, and thus avoid unnecessary amounts.

An examination of the wines as they are found to-day on the market shows that it is desirable to restrict the amount of total sulphur dioxide to 350 milligrams per liter. Wines have been offered for import, for example, containing much more than this amount of total sulphur dioxide, but there is every reason to believe that this excessive amount is due to lack of careful control. As the sulphured wine ages the sulphur dioxide, as such, gradually disappears, either by combination with the constituents of the wine or by oxidation.

A limit must likewise be placed on the free sulphur dioxide. An examination of a large number of sauternes has shown that the amount of free sulphur dioxide which they contain is needlessly high; in some cases this amount has exceeded 200 milligrams per liter, and about 20 per cent of all of the wines examined exceeded the limit set by this decision. If the amount of free sulphur dioxide in wines is placed at 70 milligrams per liter it is certain that the wines prepared for consumption can be produced in a sound condition, not only well within the maximum set for the free sulphur dioxide but for the total as well. It is absolutely necessary to restrict in some manner the sulphur dioxide in cases in which it is used under conditions such that it may enter into combination with acetaldehyde, sugars, etc., present in food products, and it is believed that under the restrictions suggested the public will be protected from products unduly sulphured during the period which must elapse before experimental evidence can be obtained as to whether a total restriction in the use of sulphur dioxide under all the conditions mentioned is necessary on account of the toxic properties possessed by sulphur dioxide in the combined form.

III. NO PROSECUTION FOR USE OF BENZOATE OF SODA IN LIMITED QUANTITIES, SEASON 1907.

The decision submitted provides that no prosecutions will be based on the manufacture, sale, or transportation of foods and food products manufactured or packed during the season of 1907 which contain sodium benzoate in quantities not to exceed one-tenth of 1 per cent, or benzoic acid equivalent thereto, provided that sodium benzoate or benzoic acid has hitherto been generally used in such foods and food products. In the opinion of the board this ruling is a proper one, for the following reasons:

There is a difference of opinion among experts as to the harmfulness of sodium benzoate or benzoic acid. Some manufacturers of food and food products have used this preservative in the honest belief that it is harmless. In the opinion of the board it is harmful, and its use should be prohibited. However, the pack of 1907 is now under way, some of it is completed, and sodium benzoate has been used extensively. By another year the manufacturers of these food products will have had ample time to adjust manufacturing condi-

tions in such a manner that the use of sodium benzoate will be unnecessary. The prohibition of the use of sodium benzoate at this time would, it is thought, work a hardship upon the manufacturers of food products out of all proportion to the benefit which would be derived by the consumers. The use of sodium benzoate for the time being in limited quantities, which are to be plainly stated upon the label, seems to be the fair solution both for the consumer and for the manufacturer.

IV. PRESENCE OF PRESERVATIVES TO BE SHOWN ON LABEL AND NO GUARANTY TO BE SHOWN.

The decision provides that the label of each package of preserved foods, or of foods containing benzoate of soda or benzoic acid, shall bear a statement that the food is preserved with sulphur dioxide or with sodium benzoate, or benzoic acid, as the case may be, and the label must not bear a serial number assigned to any guaranty filed with the Department of Agriculture or any statement that the article is guaranteed to conform to the Food and Drugs Act.

The necessity for these requirements is obvious. Where preservatives are used the labels should inform the consumers of that fact, and it is the opinion of the board that the preserved food does not comply with the law and that it is unfair to the consumer to allow a statement to be made upon the label that the preserved food is guaranteed under the food and drugs act, for the consumer may interpret this statement as a guaranty that the food is pure.

V. LIST OF DYES PERMITTED PENDING FURTHER INVESTIGATION.

The following list of dyes has been recommended in the decision for use in foods and foodstuffs, pending further investigation and announcement of its results:

Red shades:

- 107. Amaranth.
- 56. Ponceau 3 R.
- 517. Erythrosin.

Orange shades:

- 85. Orange 1.

Yellow shades:

- 4. Naphthol yellow S.

Green shade:

- 435. Light green S. F. yellowish.

Blue shades:

- 692. Indigo disulfoacid.

The decision further states that these coal-tar dyes must be made specifically for use in foods and bear a guarantee from the manufacturer that they are free from subsidiary products and represent the actual compound whose name they bear.

The following statement is necessary in order to illustrate the principles guiding the Department of Agriculture in framing this portion of the decision:

An extended study of the large number of so-called coal-tar dyes which are now in use for the coloring of foods and foodstuffs has been necessary to arrive at a conclusion concerning the restriction,

if any, which may be placed on their use, and the department acknowledges the very efficient aid rendered during the course of this study by Dr. Bernhard C. Hesse, of New York City. Dr. Hesse has had an extended experience in this subject through his long association with the leading dyestuff manufacturers in Germany. Since severing his connection with them he has given his time largely to expert work along this line.

The literature on the subject is very unsatisfactory as to what coal-tar products are used, and is not to be depended upon, because of the equivocal nature of the terminology employed. It is impossible to reduce this terminology to an unequivocal and definite basis for the great majority of such coal-tar colors.

It was impracticable to go to all those in the United States who use coal-tar dyes in food products and obtain specimens of the coal-tar colors so used. This is true not only because of the large number of such users and their wide geographical distribution, but also because of the reluctance which would undoubtedly be encountered among many such users to disclose the nature of the products employed by them.

The sources of coal-tar materials are limited in number, however. By reference to the book entitled "A Systematic Survey of the Organic Coloring Matters," by Arthur G. Green, published in 1904, on pages 9 and 10 thereof, it will be seen that there are 37 different concerns in the world engaged in the manufacture of coal-tar materials.

Therefore, a canvass of these sources for such coal-tar coloring matters as, in their judgment, or in their business practice, they regard as proper for use in food products, seemed the best mode of obtaining a knowledge of the field of the coal-tar colors here in question.

Communication was had, therefore, with 13 manufacturers of coal-tar colors in an endeavor to obtain from them a list of such coal-tar colors as, in their judgment or business practice, were deemed suitable for use in food products. When this cooperation was established, request was also made for information as to the composition of the coal-tar samples submitted, and in order to avoid confusion samples were to be identified by reference to the "Systematic Survey of the Organic Coloring Matters," by Green, in which each coal-tar color has its own number. This information is necessary to reduce the terminology to a common and unequivocal basis. The 13 manufacturers, or their accredited agents, with whom communication was held probably represent from 85 to 90 per cent of the total dyestuff output of the world.

In order to make provision for the 24 makers on the list in the Green tables, and not included in the 13 makers consulted, a request for samples was made from two New York City houses, who themselves import coal-tar colors from sources other than the above, for use in food products. Their products must fairly represent any output not represented by the 13 makers above mentioned.

The question of the choice of dyes for the coloring of foodstuffs has been decided on the basis of those dyes which have been submitted by the manufacturers or their accredited agents, but it was impossible to consider any dyes when the manufacturer or the

accredited selling agent was unwilling to state unequivocally what the dyes submitted were, so that they could be identified chemically.

When those interested in placing dyestuffs on the market for the coloring of food have shown unwillingness to give information of this kind as to what they sell, and by thus selling, recommend, the burden of proof as to the harmlessness of such dyes lies with them, and until such proofs are adduced, the use of such dyes should be inhibited.

With this knowledge of the specific nature of the dyes recommended, the department has made a study of those concerning which there has been the greatest unanimity of opinion among the manufacturers or their agents as to their fitness; and in the cases where such dyes have been studied as to their physiological action, and the reports have been favorable, they have been included in the tentative list proposed in the food inspection decision herewith.

This tentative list of dyes includes a wide range of colors sufficient for all legitimate purposes. Among them are none which are patented, so that their manufacture is open to all interested in the dye industry.

One point must be particularly emphasized regarding the use of these dyes, namely, the need for the manufacturer's guarantee of purity. It is the manufacturer above all who knows the exact nature of his dyestuffs, and if he is willing to sell his colors for use in foodstuffs he should be willing to guarantee that the dyes really are what they are represented to be, that they are not mixtures, and that they do not contain harmful impurities.

In order further to minimize the possibility of harmful impurities existing in these dyes, it has been thought necessary to require a further examination by competent experts, a certificate from whom is necessary, stating that the dyes in question are what they are represented to be.

VI. ENTRY OF VEGETABLES GREENED WITH COPPER SALTS.

The decision states:

The question of the entry into the United States of vegetables greened with copper salts has not been finally determined. Pending the determination and decision of this matter by the Secretary of Agriculture all vegetables greened with copper salts which do not contain an excessive amount of copper will be admitted to entry if the label bears a statement that sulphate of copper or other copper salts have been used.

The greening of vegetables with copper sulphate is practiced to a large extent in some foreign countries, and vegetables so treated are imported into the United States. Before the passage of the Food and Drugs Act the Department of Agriculture, under authority of the yearly appropriation acts, controlled the imports of foods. It has been the practice to admit vegetables which did not contain an excessive quantity of copper salts if the artificial color were plainly declared on the label. It is the opinion of the board that copper sulphate is injurious and should be prohibited eventually, but it would work a great injury to American importers to put this ruling into effect at once. It is believed that the use of copper sulphate or of other salts of copper in restricted quantities for greening vegetables should be permitted for the pack of the present year, but for no longer.

VII. NO PROSECUTION FOR GOODS PACKED PRIOR TO THE DATE OF THE DECISION.

The decision provides that no prosecution will be based upon the sale of foods and food products manufactured or packed in the United States prior to the issuing of this decision, where the composition of such foods and food products is at variance with the requirements of this decision, if the nature of the variation be plainly stated on the label, and that in every case the burden of proof will be on the manufacturer to show that the goods were manufactured or packed prior to the date of the decision. Obviously, it would be unfair to base a prosecution upon the use, prior to the date of the decision, of preservatives prohibited by the decision. Furthermore, unless assurances be given that no prosecutions will be had for the sale of this class of goods a very large quantity of food will be rendered unsalable, and the injury which will be inflicted upon the country will be out of all proportion to the benefit which is expected to be derived.

F. I. D. 77 (Sept. 16, 1907).

CERTIFICATE AND CONTROL OF DYES PERMISSIBLE FOR USE IN COLORING FOODS AND FOODSTUFFS.¹

The Department of Agriculture is in receipt of a large number of inquiries concerning the interpretation to be put on that portion of F. I. D. 76 which refers to coal-tar dyes not inhibited for use in coloring foods and foodstuffs.

The term "manufacturer," as used in F. I. D. 76 and in the present decision, applies to a person or company responsible for the purification of the crude or raw dye for the purpose of placing it in a condition fit for use in foods and foodstuffs; or to the accredited selling agent in the United States of such person or company. Such accredited agent must file, on behalf of his foreign principal, if the latter does not file it, a manufacturer's certificate, and it will be considered that the responsibility for such certificate will rest upon the accredited agent and not upon the foreign principal.

For each permitted dye two certificates must be filed by the manufacturer, the first to be known as the "Foundation certificate," the second known as the "Manufacturer's certificate." It is suggested that the foundation certificate be in the following form:

FOUNDATION CERTIFICATE.

I, _____, the undersigned, residing at _____,
(Street address.)
 in the city of _____, county of _____, State of _____,
 hereby certify under oath that I have personally examined and tested for _____, of _____, county
(Full name of concern.) (City.)
 of _____, State of _____, the material known as _____,
 which corresponds to the coloring matter numbered _____
 in A. G. Green's Edition (1904) of the Schultz-Julius "Systematic Survey of the Organic Coloring Matters," and of which a one (1) pound sample marked _____ is herewith submitted. I have found the said material to consist of that color-

¹For definitions of the terms "batch" and "mixtures," as used in this decision, see F. I. D. 106. See also F. I. D. 117 relative to the use of certified colors.

ing matter only, to be free from harmful constituents, and not to contain any contamination due to imperfect or incomplete manufacture.

(Here insert a complete statement of all the tests applied to determine:

A. Identity.

B. Absence of

a. Mineral or metallic poisons.

b. Harmful organic constituents.

c. Contamination due to improper or incomplete manufacture.

Special attention should be given to setting forth fully the quantities or volume of each material and reagent employed, its strength or concentration, temperature, duration of treatment, limits of delicacy of tests employed, and any other information that is necessary to enable others to repeat accurately and correctly all the work herein referred to and thus arrive at identical results. For each test performed, state what conclusions are drawn from it and why.)

(Signature of chemist making the examination.)

CERTIFICATION.

For the manufacturer's certificate the following form is suggested:

MANUFACTURER'S CERTIFICATE.

I, -----, the undersigned, a resident of the United States, doing business at -----, in the city of -----, county of -----, State of -----, under the style of -----, do hereby certify under oath that I am the manufacturer of the material known as -----, which corresponds to the coloring matter numbered ----- in the 1904 Green Edition of the Schultz-Julius Tables, of which the accompanying foundation certificate, signed by -----, the examining chemist, is the report of an analysis of a fair, average sample drawn from a total batch of ----- pounds.

(Signature of manufacturer.)

CERTIFICATION.

The foundation certificate must be filed with the Secretary of Agriculture at the time the first request is made of the Secretary to use any or all of the permitted dyes for coloring foods and foodstuffs.

The following form of supplemental certificate is suggested in those cases where a manufacturer desires to apply for permission to place on the market a new batch of coal-tar dye, which dye has already had a foundation certificate and a manufacturer's certificate filed for it.

SUPPLEMENTAL CERTIFICATE.

I, -----, the undersigned, residing at -----, in the city of -----, county of -----, State of -----, hereby certify under oath that I have personally examined and tested for -----, of -----, county of -----, State of -----, the material known as -----, which corresponds to the coloring matter numbered ----- in A. G. Green's Edition (1904) of the Schultz-Julius "Systematic Survey of the Organic Coloring Matters," of which a one (1) pound sample marked ----- is herewith submitted, and I have found it to consist of that coloring

matter only and to be free from harmful constituents and not to contain any contamination due to imperfect or incomplete manufacture.

This examination was conducted in strict accordance with the detailed scheme of examination fully set forth in the foundation certificate filed -----

(Date.)

(Signature of chemist.)

CERTIFICATION.

This supplemental certificate should likewise be accompanied by the same type of manufacturer's certificate as is described above.

When the certificates filed with the Department of Agriculture are found to be satisfactory, a "lot number" will be assigned to each batch, which lot number shall apply to that batch alone and to no other batch of the same color.

According to F. I. D. 76, the seven permitted coal-tar dyes therein named, made specifically for use in foods, may be used in foods provided they bear a *guaranty* from the manufacturer that they are free from subsidiary products and represent the actual substance the name of which they bear. The guaranty herein considered shall be applied as follows:

Each package sold by the manufacturer should bear the legend "Part of Certified Lot Number -----." The foundation certificate, as well as the corresponding supplemental certificate, does not apply to any certified dye beyond the package originally prepared by the one establishing this certificate. If such a package be broken and the dye therein contained be repacked, the repacked dye, except as herein-after provided, becomes an uncertified dye, and as such is inhibited.

There is no objection on the part of the Department of Agriculture to mixtures made from these permitted and certified dyes, by those who have filed certificates with the Department, but one (1) pound samples of such mixtures, and the trade name under which each mixture is sold, must be sent to the Secretary of Agriculture, and no such trade name or keyed modification thereof may be used for any other mixture.

The exact formula—that is, the true names as well as the numbers assigned to the original package and the proportions of the ingredients used—should be deposited with the Secretary of Agriculture, but such formula need not appear on the label; in lieu of which may appear the legend "Made from Certified Lots Number ----- and Number -----," etc. If the packages of these mixtures bearing this legend be broken and repacked, the mixture becomes, except as hereinafter provided, an uncertified one, and hence its use is inhibited; that is, the guaranty of the manufacturer shall extend only to the packages prepared by himself and only for so long as they remain in the unbroken form. Whenever new lots of previously established mixtures are made, making use of new certified straight dyes therein, thus necessitating a change in the label, 1-pound samples of the new mixtures should be sent to the Secretary of Agriculture.

The term "competent experts" as used in F. I. D. 76 applies to those who, by reason of their training and experience, are able to examine coal-tar coloring matter to ascertain its identity and to determine the absence of foreign matter not properly belonging to the product, which, if present, renders the substance unfit for use in food products.

The term "batch" as used above is such a quantity of the product as has undergone the same treatment at the same time and the same place as a unit and not otherwise—that is, the lot for one purification.

Those to whom certification is given with respect to their dyes and a lot number assigned should control the sale of such batches so that they may account to the Department of Agriculture by inspection of their books or otherwise for the destination and disposal of each batch.

Those using these certified dyes in the preparation of foods and foodstuffs must be in a position to substantiate the fact that the dyes so used were of a properly certified character.

There is no guaranty on the part of the Department of Agriculture that because the tests described in any foundation certificate have once been accepted, the permanency of such acceptance is assured.

In those cases where a package of a straight dye or a mixture of such dyes, bearing proper labels to the effect that they are of a certified lot or lots, is broken and repacked in still smaller lots, or treated with solvents, mixed, etc., the person or company so treating these dyes must stand sponsor for their integrity. This may be accomplished by submitting a statement to the Secretary of Agriculture as follows:

SECONDARY CERTIFICATE.

I, _____, residing at _____, do hereby certify
 (Full address.)
 under oath that I have repacked _____ lbs. of certified lot (or lots) _____
 _____, purchased from _____, of _____
 This repacking has been accomplished in the following fashion: _____

 (Full description of what has been done with the lot or lots.)

 (Name.)

CERTIFICATION.

On presentation of this certified form, properly filled out, to the Secretary of Agriculture, a lot number will be assigned, which number should be used in labeling according to the methods already described. If, for example, a portion of lot number "127" is repacked in smaller packages, the lot number "127 A" will be assigned to this repacked dye, to enable the Department to follow this into consumption if necessary and still trace it back to the person by whom the dye was originally certified.

F. I. D. 78 (Oct. 8, 1907).

THE USE OF LABELS AFTER OCTOBER 1, 1907.

When the Rules and Regulations for the Enforcement of the Food and Drugs Act were issued by the three Secretaries on October 16, 1906, one of the regulations, 17 (*i*), provided that any labels printed and on hand that day which did not contain a misstatement as to the character of contents, but which were not in strict compliance with other requirements of the regulations, might be issued without fear of prosecution until October 1, 1907.

Recently the National Wholesale Grocers' Association, and individual grocers, wholesalers, and jobbers throughout the United States, requested the Board of Food and Drug Inspection to recommend to the three Secretaries the extension of the privilege until October 1, 1908.

After a careful consideration of the matter the board has unanimously decided to refuse to recommend such an extension. It is the opinion of the members of the board that sufficient time has elapsed for manufacturers, jobbers, and wholesalers to adjust their business affairs to the terms of the law and of the regulations.

It is apparent, from the letters received by the board, that the general impression exists that the use of corrected labels will not be permitted after October 1, 1907. This is an erroneous impression and is evidently gathered from the wording of regulation 17 (*i*), and more particularly from Food Inspection Decision 43, which stated that on and after October 1, 1907, the labels must be originally properly printed. This statement was advisory and conveyed a warning that a further extension of the privilege need not be asked. It is desirable, of course, both from the standpoint of the Government officials who have charge of the enforcement of the law and from the view-point of the manufacturers, that the labels should be correct as originally printed.

Any person has a right to use a label which is not false or deceptive in any particular, even though this result is arrived at through the use of stickers, erasures, or other suitable means. Attention, however, is directed to the fact that misleading and deceptive statements must be obliterated. In other words, it is not sufficient, in the opinion of the board, that a deceptive statement should be allowed to remain on one portion of the label with a corrective statement upon another portion of the label. This principle of correction will be waived until further notice in case of decorated sardine tins which were printed and manufactured prior to January 1, 1907. In these cases the corrections may all be made in one label attached securely to one side of the package. Each invoice should be accompanied by a certificate from the exporter, showing the date of manufacture of the tins.

F. I. D. 79 (Oct. 8, 1907).

COLLECTION OF SAMPLES.¹

[Amendment to regulation 3, p. 17, *ante*.]

F. I. D. 80 (Oct. 31, 1907).

GLAZED COFFEE.

There have been frequent inquiries made regarding the application of the Food and Drugs Act to the practice of glazing coffee. The following is a type of the communications of this nature:

It has been the custom with many roasters of coffee to use a finish, made out of supposedly harmless ingredients, on their coffees, especially the lower grades,

¹Approved by the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor. See regulation 3 of the rules and regulations.

the main object being to lessen the natural loss in weight during the process of roasting, and thus reduce the cost.

We used a finish, ourselves, made up of lemon juice, flaxseed, gelatin, bicarbonate of soda, and lime water, until January 1, 1907, when we ceased, as we were uncertain as to its lawfulness under the Pure Food and Drugs Act which went into effect that day. If it is against the law, we would ask that the pure food commission prepare a ruling on coffees, such as has been done on rice, and have this ruling take effect as soon as possible, as manufacturers who are adhering to this method of roasting are enabled to undersell those who are using the natural roast, thereby placing them at a decided advantage.

Coffee is coated for one or all of the following reasons:

1. To restore, at least in part, the loss of weight incident to roasting.
2. To conceal damage or inferiority.
3. To prevent the depreciation of the roasted coffee due to the escape of the aromatic constituents.
4. To prevent the absorption of water which renders the roasted grains tough.

It would appear that the questions involved in this practice are similar in many respects to those involved in the polishing and coating of rice, which is discussed in F. I. D. 67. As in the case of coating rice, it is the opinion of the department that no coating of any kind can be applied to the coffee "if the product be mixed, colored, powdered, coated, or stained in any manner whereby damage or inferiority is concealed." In each case, whether or not such a result be secured is a question of fact to be decided by the evidence.

It is held by the department that coffee treated in the manner indicated with lemon juice, flaxseed, gelatin, bicarbonate of soda, and lime water should be labeled in all cases with the name of the extraneous substances, as,

COATED WITH LEMON JUICE, FLAXSEED, GELATIN, BICARBONATE
OF SODA, AND LIME WATER.

In such declarations all of the substances used for coating should be mentioned. Any coloring matter or other substances that may be employed to change the tint of the coffee should be declared on the label.

F. I. D. 81 (Oct. 31, 1907).

LABELING OF CARAMELS.

The department is in receipt of the following inquiries from manufacturers of confectionery:

1. *Milk caramel*.—This piece contains no milk, but is composed principally of sugar and glucose, and we would like very much to know if milk were added to this formula whether we could still continue to call it "Milk Caramel."

2. *Peaches and cream caramel*.—This piece is made up principally of sugar and glucose and milk, and flavored with peach flavor. As there are 50 pounds of milk to a batch of 116 pounds, would this be considered as one of the principal ingredients?

3. *Whipped cream caramel*.—This piece does not contain any cream or milk, but is made up principally of sugar and glucose. The batch is, however, whipped, and if we should add milk to it, would it be misbranding to continue to call it "Whipped Cream Caramel?"

Section 8 of the Food and Drugs Act of June 30, 1906, provides that any article of food is misbranded (1) if it be an imitation of or offered for sale under the distinctive name of another article; (2)

if it be labeled so as to deceive or mislead the purchaser; (3) if the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substance contained therein, which statement, design, or device, shall be false or misleading in any particular.

These portions of section 8 bear directly on the above as concerning the labeling of different types of caramels. Caramel No. 1 would be distinctly a case of misbranding, since it contains no milk.

In regard to caramel No. 2, it is evident that if milk is used in that product, it is false and misleading to call it "Cream Caramel." It is thought that this product would be properly labeled as "Peach-Flavored Caramel" or "Caramel, Peach Flavor," if the peach flavor is not produced by the use of an imitation product. If an imitation peach flavor is used, the caramel could be properly branded only as "Imitation Peach-Flavored Caramel" or preferably, "Caramel, Imitation Peach Flavor." The question as to whether the 50 pounds of milk used to a batch of 116 pounds forms one of the principal ingredients would have to be determined by the proportion of the ingredient found in the finished article. This question, however, is immaterial in considering the question as to whether the name "Cream" can be applied to the caramel.

To caramel No. 3 the above statements apply equally well. Since it does not contain any cream, the label "Whipped Cream Caramel" would be false and misleading. Even if milk were added to the batch and the whole were whipped, the product would not be entitled to bear the label "Whipped *Cream* Caramel."

F. I. D. 82 (Nov. 11, 1907).

LABELING OF COFFEE PRODUCED IN THE DUTCH EAST INDIES.

There seems to be in the trade much uncertainty respecting the requirements of the Department of Agriculture as to the labeling of coffee produced in the Dutch East Indies. This question has been under advisement by the department for some time, and, with the cooperation of the Department of State, important information has been secured.

The Department of State was asked to communicate with the Government of the Netherlands and ascertain to what extent in the opinion of that government the term "Java" should be used in harmony with the provisions of the law as applicable to coffees produced in the Dutch East Indies.

A communication has been received through the Department of States from the American minister at the Hague, who has consulted the Netherlands Government on this subject. In this communication the American minister states—

The term "Java Coffee" has been abused for many years, hence it arises that of both roasted and unroasted coffee, perchance ten times as much coffee is sold to the consumer, under the name of "Java Coffee," as is grown in Java.

In conformance with the provisions of the "pure food act," all coffee coming from the island of Java might be called "Java Coffee," that from the Padang districts "Padang Coffee," that from Celebes "Celebes Coffee," and all other sorts from the Netherlands Indies "Dutch East Indies Coffee."

In the Netherlands what is known as "Java coffee" is only the *Coffea arabica* produced in Java, so that the *Coffea liberica* coming from that island under the name of "Java coffee" falls as little under that term as all the coffee from the rest of the islands of the Indian Archipelago.

The department is of the opinion that the suggestions which are incorporated in this quotation from the American minister at the Hague indicate a proper method of labeling coffee coming from the Dutch East Indies.

Coffee grown on the island of Sumatra would also be properly labeled if called "Sumatra Coffee," or, if desired, the label may state specifically and correctly the particular location in which the coffee in question was really grown.

F. I. D. 83 (Nov. 22, 1907).

THE ISSUE OF A GUARANTY BASED UPON A FORMER GUARANTY.¹

Food Inspection Decision 83, giving the opinion of the Attorney General on certain phases of the use of the guaranty under section 9 of the Food and Drugs Act, June 30, 1906, is promulgated by the Department of Agriculture for the guidance of those who have occasion to make use of such guaranties during the carrying on of their ordinary business relations.

OPINION OF THE ATTORNEY-GENERAL.²

NOVEMBER 11, 1907.

The Honorable The Secretary of Agriculture:

SIR: I have the honor to acknowledge the receipt of your letter of September 10, in which you request my opinion upon a question which has arisen in your department in the administration of the Food and Drugs Act of June 30, 1906, in a class of cases of which the following is a type:

An examination having been made in the Bureau of Chemistry, in accordance with section 4 of the act, of a sample of food purchased from a retail dealer in the District of Columbia, and the food having been found to be adulterated, the dealer was cited for a hearing, and, having appeared, established as a defense under which he claimed protection a written guaranty, conforming to the requirements of section 9 of the act, from a Maryland wholesaler who had sold him the food and shipped it to him in the District of Columbia in the exact condition in which he sold it here.

The Maryland wholesaler, having been then cited, in turn appeared and established a similar guaranty, under which he also claimed protection, from a Pennsylvania manufacturer who had sold him the food and had shipped it to him in Maryland in the exact condition in which he had, in turn, guaranteed it and shipped it to the retailer in the District of Columbia.

The question upon which my opinion is requested is whether, upon such state of facts, the Maryland wholesaler is amenable to prosecu-

¹ See regulation 9, p. 19, *ante*, and F. I. D. 40, 70, 72, 96 and 99 on guaranties; also F. I. D. 153, May 5, 1914, amending regulation 9.

² 26 Op. Atty. Gen., 449.

tion for violation of the act or is protected by the guaranty from the Pennsylvania manufacturer.

By section 2 of the Food and Drugs Act (34 Stat., 768) it is made a misdemeanor, *inter alia*, to ship any adulterated or misbranded food or drugs in interstate commerce, or to receive the same in such commerce, and, having so received, to deliver the same to any other person in original, unbroken packages, or to sell the same in the District of Columbia.

Section 9 of the act further provides:

That no dealer shall be prosecuted under the provisions of this act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this act, designating it. Said guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines, and other penalties which would attach, in due course, to the dealer under the provisions of this act.

After careful consideration of this act, together with the memoranda prepared by the members of the Board of Food and Drug Inspection, which you have submitted with your letter, I am of the opinion that the guaranty from the Pennsylvania manufacturer affords complete protection to the Maryland wholesaler and that he is hence not amenable to prosecution under the act on account either of the interstate sale and shipment made by him to the retailer in the District of Columbia or of the guaranty given by him in connection therewith.

1. It is clear that the Maryland wholesaler is protected from prosecution for the interstate sale and shipment made by him, by the explicit provision of section 9, that "no dealer shall be prosecuted under the provisions of this act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of the act."

The broad term "dealer" which is used in this section, not being restricted in its meaning by any other provision of the act, includes those who deal at wholesale as well as those who deal at retail. I am of the opinion, therefore, that under the plain language of this provision any dealer, whether a wholesaler or retailer, who would otherwise be amenable to prosecution for dealing in an adulterated or misbranded article in violation of the act, is protected from prosecution on such account by establishing a guaranty in conformity with the requirements of the act, signed by a resident of the United States from whom he purchased such article.

2. A more difficult question, however, arises in reference to the liability of the Maryland wholesaler to prosecution by reason of the guaranty which he gave the District of Columbia retailer in connection with the sale and shipment to him.

It is expressly provided by section 9 of the act that wherever a dealer who would otherwise be subject to prosecution establishes a guaranty from a resident of the United States who sold him the articles, the dealer is thereby protected, and such guarantor "shall be amenable to the prosecutions, fines, and other penalties which would

attach in due course, to the dealer under the provisions of this act." Construing this section in its entirety, I am of the opinion that its purpose was to create, in addition to the offense of manufacturing and dealing in adulterated and misbranded food and drugs specifically made misdemeanors by sections 1 and 2 of the act, the distinct and substantive offense of guaranteeing, under the Food and Drugs Act, any adulterated or misbranded article—thereby enabling the purchaser to deal with such articles in a manner otherwise forbidden without being amenable to the punishment to which he would otherwise be subject—the offense of giving such false guaranty, however, not to be complete until the purchaser deals with the article thus guaranteed in a manner otherwise punishable by the act, in which event the guarantor would become subject to the same punishment for giving the false guaranty as that to which the purchaser would otherwise be amenable by reason of his dealing with the article.

Without discussing the scope and effect of this provision, I am of the opinion that whatever this may be, the maker of a false guaranty is just as much protected from any prosecution to which he might be liable on this account by establishing a former guaranty from the person from whom he purchased the article as he is thereby protected from prosecution for dealing with the article in a manner otherwise forbidden by the act; in other words, that the former guaranty is a complete protection against any prosecution under this act.

It is true that section 9 does not specifically state that the first guaranty shall protect the second guarantor, but this result follows from the broad provision that "no dealer shall be prosecuted under the provisions of this act when he can establish a guaranty signed by the * * * party * * * from whom he purchases such articles." As a prosecution for the false guaranty would be a prosecution "under the provisions" of the act, and as the dealer's protection under his vendor's guaranty is not limited by the act to prosecutions for dealing in the articles, but includes all prosecutions under its provisions, a former guaranty would in my opinion afford a dealer protection against the punishment to which he might otherwise be amenable for his own false guaranty as well as for selling or shipping the article in violation of the act.

In short, the intention of Congress appears to have been to relieve from liability any person who would otherwise be subject to any prosecution under the act if he establishes a guaranty from the person who sold him the goods, provided such person is a resident of the United States and therefore himself within the reach of prosecution, and to make such original guarantor subject to prosecution in lieu of the subsequent offender, Congress evidently intending to refer back liability in such case, in general, to the original guarantor, who, of course, in the case of goods of domestic production, would usually be the manufacturer, who would know their real character, and, in the case of goods imported from a foreign country, would be the importer, who would assume responsibility therefor, and to make the liability to punishment fall upon such original guarantor so far as possible.

It further appears from the report of the House Committee on Interstate and Foreign Commerce, which reported the food and drugs bill for passage in substantially the form in which it was afterwards

enacted, and which, under the doctrine of *Holy Trinity Church v. United States*, 143 U. S., 457, 464, and *United States v. Binns*, 194 U. S., 486, 495, may be properly looked to for the purpose of throwing light upon the intent of Congress, that the provision in question was inserted in the bill by the committee and that its general purpose was to protect persons dealing in the articles subsequent to the manufacturer or importing agent and direct the penalty to the original guarantor as far as possible. The committee in its report said:

As the principal purpose of the bill is to prevent interstate and foreign commerce in adulterated or falsely branded articles of food, drink, and medicine, the committee has inserted in the bill a provision intended to protect all persons dealing in the articles subsequent to the manufacturer or importing agent.

Section 8 of the bill provides that no dealer shall be convicted when he is able to prove a guaranty of conformity with the provisions of the act signed by the manufacturer or the party from whom he purchased. The section requires that the guarantor shall reside within the United States and that the guaranty shall contain his full name and address.

In other sections of the bill there are provisions for collecting samples or specimens and the examination of such in order to determine whether they are adulterated or misbranded, and the bill provides that any party from whom a sample was obtained shall be given an opportunity to be heard before the Secretary of Agriculture shall certify to the United States district attorney the results of an examination of the article as the basis for prosecution; so that if samples of goods shall be taken from a retail or wholesale dealer who has received a guaranty of conformity with the provisions of the act from the person who sold to him, he will be relieved from prosecution, and any penalty which may attach under the act will be directed to the original guarantor.

These carefully prepared provisions of the bill will prevent any dealer being put to the expense of a prosecution when he takes the precaution to protect himself by requiring a guaranty. (H. Rept. 2118, 59th Cong., 1st sess., p. 3.)

And again:

The prosecutions which will be commenced by the national authorities will be mainly directed against the manufacturers of food products; or, if it be impossible to find the manufacturer, against the jobbers and wholesale dealers. (H. Rept. 2118, *supra*, p. 9.)

Section 8 of the bill which was thus inserted by the committee read as follows:

That no dealer shall be convicted under the provisions of this act when he is able to prove a guaranty of conformity with the provisions of this act in form approved by the rules and regulations herein provided for, signed by the manufacturer or the party or parties from whom he purchased said articles: *Provided*, That said guarantor resides within the United States. Said guaranty shall contain the full name and address of the guarantor making the sale to the dealer, and said guarantor shall be amenable to the prosecutions, fines, and other penalties which would otherwise attach in due course to the dealer under the provisions of this act. (H. Rept. 2118, *supra*, p. 11.)

It will be seen that the provision thus inserted and commented upon by the committee is substantially the same, so far as the present question is concerned, as section 9 of the bill as afterwards enacted, and it is made clear by this report that it was the intent of the committee, at least, in inserting this provision to entirely relieve from prosecution any retail or wholesale dealer who had received a guaranty from the person from whom he purchased, and, as stated by the committee, to "prevent any dealer from being put to the expense of a prosecution when he takes the precaution to protect himself by requiring a guaranty."

Any other construction of this act would work great hardship upon an innocent intermediary who, relying upon the guaranty which he receives from the original manufacturer of an article, sells it in interstate trade and guarantees it in his turn. And if the original guaranty does not fully protect him in such case, it would become exceedingly hazardous to sell and guarantee such article, even though guaranteed by the manufacturer, without first making, on his own account, a detailed investigation, chemical or otherwise, to ascertain whether it is in fact adulterated or misbranded. Manifestly, however, such a requirement would in many cases seriously impede and obstruct interstate trade.

It is stated in Dr. Dunlap's memorandum that, from the conditions that the Board of Food and Drug Inspection has found to exist throughout the whole business community, dealers engaged in interstate trade are insisting on a guaranty from the seller and purchasing only under such guaranty; that in order to do an interstate business to-day a dealer must give a guaranty with the goods he sells, whether he be the actual manufacturer or not; and that if the dealer can not rely upon the manufacturer's guaranty as a protection, it must have the effect of preventing interstate sales on the part of small concerns, and even of large concerns who probably would not care to incur the added expense and trouble, in many cases prohibitive, of having the goods carefully analyzed in order to be fully acquainted with their character.

There is, however, a presumption against a construction of a statute which "would cause grave public injury or even inconvenience" (*Bird v. United States*, 187 U. S., 118, 124). And it was said by Lord Coke, in language which was quoted by Abbott, C. J., in *Margate Pier Co. v. Hannam*, 3 B and Ald., 266, 270, and cited with approval in *Holy Trinity Church v. United States*, 143 U. S., 457, 459, that: "Acts of Parliament are to be so construed as no man that is innocent or free from injury or wrong be, by a literal construction, punished or endamaged."

The construction which I have given the act is furthermore supported by the view expressed in Greeley's Food and Drugs Act, section 65, page 4, that:

A wholesaler or jobber who purchases food or drug products from the producer or from anyone else may safely guarantee the goods so purchased to his consumers, provided he has from the producer or other person from whom he purchased the goods a guaranty covering them.

For these reasons, I am of the opinion that in the case stated the Maryland wholesaler is not amenable to prosecution under the act but is completely protected by his guaranty from the Pennsylvania manufacturer.

3. I should add, however, that the fact that both the District of Columbia retailer and the Maryland wholesaler are protected from prosecution by the guaranties which they have established from their respective vendors, does not, in my opinion, exempt the adulterated food from confiscation under section 10 of the act, which provides, *inter alia*, that any adulterated or misbranded food or drug which is being transported in interstate commerce for sale, or, having been transported, remains unloaded, unsold, or in original, unbroken packages, or is sold or offered for sale in the District of Columbia, may

be proceeded against in the district where found "and seized for confiscation by a process of libel for condemnation." The provision of section 9 that no dealer shall be prosecuted when he establishes a guaranty from his vendor merely affords protection, in my opinion, against the criminal prosecution, fines, and other penalties to which the dealer would otherwise be personally amenable, and does not in any way affect the liability of the merchandise to confiscation under the provisions of section 10.

Respectfully,

CHARLES J. BONAPARTE,
Attorney General.

F. I. D. 84 (Jan. 31, 1908).¹

AMENDMENTS TO REGULATIONS 17 AND 19.

[Amendments to regulation 17, label, and regulation 19, character of name, pp. 22, 24, *ante*.]

F. I. D. 85 (Feb. 3, 1908).

LABELING OF BITTERS.

In section 6 of the Food and Drugs Act of June 30, 1906, the term "drug," as defined in the act, includes "all medicinal preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use and *any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease in either man or other animals.*"

Notwithstanding this comprehensive definition, it appears from a large correspondence on this subject that there is still some uncertainty as to whether or not certain commodities should be classed as drug products, and of this type are the alcoholic products known as "bitters."

It is necessary to determine definitely whether or not "bitters," for example, are to be classed as drugs. This is necessary for the reason that under section 8 of the Food and Drugs Act a drug is deemed misbranded "if the package fails to bear a statement on the label of the quantity or proportion of any alcohol * * * contained therein."²

On investigation of labels that are found on "bitters" it has been discovered that in most cases they are recommended for various ailments. For example, they are said to "aid digestion," "allay irritation of the nerves," "excite the appetite to a marvelous degree," "prolong life." Again, labels bear the statements "is not only a delicious beverage, but also a wonderful tonic," "valuable in intermittent fever, illness due to the spleen, stomach catarrh, diarrhea, colic, cramps, vomiting, hypochondria, etc." These are examples of common phrases found on labels. "Bitters" are frequently prescribed in the same

¹ Approved by the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor. See regulations 17 and 19.

² *Held*, that in a prosecution for violation of the Food and Drugs Act the Government can not be required to elect between two counts of an information, one describing an article as a food and the other describing it as a drug. *Steinhardt Bros. & Co. v. United States*, p. 488, *post*.

manner as medicines in general. For example, "to be taken in table-spoons full every hour," "increase the dose if the effect is not immediate," etc.

It is well known that certain substances may be used both as foods and as drugs. It is claimed by some that certain products advertised as medicinal products are not sold and consumed on account of their medicinal properties, but merely as alcoholic beverages. This, however, does not seem to be consistent with the information found on some of the labels.

In a case of this kind the classification will be made from a study of the literature published in connection with the article and by ascertaining the uses to which it is put. When a "bitters" is described on the carton or label attached to the bottle, or any advertising matter accompanying the package, as possessing any medicinal or tonic properties, or if in fact it does possess such value, it must of necessity be classed as a drug product and, in consequence of this classification, bear a statement of the quantity or proportion of any alcohol contained therein. The method of stating the proportion of alcohol is that of per cent by volume, as suggested in regulation 28 of Circular 21 of the Office of the Secretary. In Food Inspection Decision 52 is the suggested order in which the statements required by law should occur on a label.

This food inspection decision is promulgated so that those interested in the importation of "bitters" may understand how the Department is obliged to rule in such cases, the decision as to whether a product be a food or a drug depending not only upon what claims are made for it, but also upon the uses to which it is put. This same principle must guide the Department in its interpretation of the law governing similar products which have the dual function of serving as both foods and drugs.

F. I. D. 86 (Jan. 31, 1908).

ORIGINAL PACKAGES: INTERPRETATION OF REGULATION 2 OF RULES AND REGULATIONS FOR THE ENFORCEMENT OF THE FOOD AND DRUGS ACT.

Regulation 2 of the Rules and Regulations for the Enforcement of the Foods and Drugs Act (Circular No. 21, Office of the Secretary, United States Department of Agriculture) declares—

The term "original unbroken package" as used in this act is the original package, carton, case, can, box, barrel, bottle, phial, or other receptacle put up by the manufacturer, to which the label is attached, or which may be suitable for the attachment of a label, making one complete package of the food or drug article. The original package contemplated includes both the wholesale and the retail package.

This definition of original unbroken package was inserted in the regulations for the purpose of facilitating the administration of the act. It was intended to be, or at all events is, a guide to the inspectors who purchase the samples throughout the United States, as to the nature of an original unbroken package. Upon the basis of this regulation the inspectors have collected a large number of samples, but when an examination of some of the cases has been made, with prosecutions in view, it has been found that no action could be taken be-

cause the package bought was not an original package, though apparently so upon a reasonable interpretation of the regulation. Furthermore, the department is advised that the food commissioners of some of the States, guided by a literal interpretation of the regulation, have refrained from enforcement of their laws upon all packages apparently embraced within its terms.

It is believed that the discussion of the question and the cases cited will prove helpful to those United States attorneys to whom cases are reported for seizure in original packages under section 10 of the Food and Drugs Act.

To prevent the further misconception of the scope of the regulation, and for the information of those concerned, it is the purpose of this decision to set out the interpretation the department has made of it, and the authorities therefor.

Construed in the light of judicial determinations of the question, the terms "original unbroken packages" (as set out in the regulation and as used in sections 2 and 10 of the act) and "unbroken packages" (as used in section 3 of the act) will be restricted to such a package containing the food and drug product as has been prepared for shipment or transportation and shipped or transported, as an entirety or unit, from a State, Territory, or the District of Columbia, or a foreign country, into another State, Territory, or the District of Columbia, and delivered to the consignee, remaining his property in the identical form and condition in which it was shipped or transported. After arrival in a State and delivery to the consignee, if any part of the contents of the package be removed, or if the package be opened and commingled with other property, or if the package be *transferred* by the consignee, it is no longer an original package. The retail package is not an original package unless it bears the characteristics set forth above.

It is not practicable to frame an universally accurate and satisfactory definition of an "original package." No statute has done so, and the department disclaims any attempt to do so in its construction of the terms. The question must be determined largely upon each case as it arises, with the guidance of the authoritative decisions of the courts, which for the sake of elucidating and explaining the subject are presented in the following pages of this decision.

The Food and Drugs Act of June 30, 1906, entitled "An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes," provides in sections 2, 3, and 10 as follows:

SEC. 2. * * * Any person * * * who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in *original unbroken packages*, for pay or otherwise, or offer to deliver to any other person, any such article [food or drug] so adulterated or misbranded within the meaning of this Act, * * * shall be guilty of a misdemeanor, and for such offense be fined not exceeding two hundred dollars for the first offense, and upon conviction for each subsequent offense not exceeding three hundred dollars or be imprisoned not exceeding one year, or both, in the discretion of the court. * * *

SEC. 3. That the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this Act, including the collection and examination of specimens of foods and drugs * * * which shall be offered for

sale in *unbroken packages* in any State other than that in which they shall have been respectively manufactured or produced. * * *

SEC. 10. That any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this Act, and is being transported from one State, Territory, District, or insular possession to another for sale, or, having been transported, remains unloaded, unsold, or in *original unbroken packages*, * * * shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. * * *

In the enforcement and administration of these provisions, it is necessary to determine what is an "original unbroken package" or an "unbroken package." For the purpose of such determination it is not permissible to resort to the common and popular understanding of these words, for the reason that they have received a *special* meaning and import when applied to the law of interstate and foreign commerce through numerous judicial decisions upon the commerce clause of the Constitution and were employed in the food and drugs act in that sense. It will be seen hereafter that these words, when used in their legal signification in connection with interstate or foreign commerce, are of restricted import.

The expression "original package" was employed for the first time in the case of *Brown v. Maryland* (25 U. S., 419), decided by the Supreme Court of the United States in 1827. In the larger number of cases subsequent thereto in which the expression is used it will be seen that no modification is made in the term. But in the present act the word "unbroken" has been added in sections 2 and 10, and has been substituted for "original" in section 3, but without qualifying effect, as the courts have used the words "unbroken" and "original" as synonymous. It is held, therefore, that their combination or substitution effects no change in significance. (*Low et al. v. Austin*, 80 U. S., 29; *United States v. Fox*, Federal Cases No. 15155.)

It is sought in this decision to show *what is an original package*. Possibly it might be logical to proceed to that question at once, but it has been thought advisable, if not necessary, to consider first the extent of the power of Congress over food and drug articles transported into a State from another State or Territory, the District of Columbia, or a foreign country, and there remaining. When this has been considered it will appear that the control of Congress over food and drugs, so transported, continues, after their arrival in the State, so long as they are in original packages. It will then be shown what is an original package.

In *Brown v. Maryland*, heretofore referred to, it was decided that the law of Maryland imposing a license tax upon all importers of foreign articles, dry goods, and merchandise by bale or package, and upon other persons selling the same, was unconstitutional so far as it undertook to require such license tax from an importer of goods from a foreign country for the sale thereof *in the original packages in which they were imported*; that such a tax was an interference with foreign commerce, which, under the Constitution of the United States, was committed to Congress to regulate. The conclusion of the court is contained in the following syllabus:

An act of a State legislature, requiring all importers of foreign goods by the bale or package, etc., and other persons selling the same by wholesale, bale, or package, etc., to take out a license, for which they shall pay \$50, and in case of neglect or refusal to take out such license, subjecting them to certain forfeitures

and penalties, is repugnant to that provision of the Constitution of the United States which declares that "no State shall, without the consent of Congress, lay any impost or duty on imports or exports, except what may be absolutely necessary for executing its inspection laws;" and to that which declares that Congress shall have power "to regulate commerce with foreign nations, among the several States, and with the Indian tribes."

The goods in this case were imported from a foreign country, but the court said—

It may be proper to add, that we suppose the principles laid down in this case, to apply equally to importations from a sister State.

This dictum was afterwards affirmed as law in the case of *Leisy v. Hardin* (135 U. S., 100), decided in 1899, which overrules *Peirce v. New Hampshire* (46 U. S., 504), decided subsequently to *Brown v. Maryland*. In *Peirce v. New Hampshire* it was held that a barrel of gin shipped from Massachusetts to New Hampshire was subject to the law of New Hampshire prohibiting the sale of gin, so as to render the seller amenable to the law for the sale of the barrel in the exact condition in which he received it.

In the case of *Waring v. The Mayor* (75 U. S., 110), decided in 1868, the Supreme Court held that sacks of salt brought into Mobile Bay from England and sold to a merchant in Mobile City after arrival of the vessel in the bay, 25 miles from the city, and transported by the merchant's lighters to Mobile, were subject to taxation by the city. The sacks had been sold by the importer after their arrival in Alabama, and hence were merged in the general mass of property in the State and were no longer under the shelter of the commerce clause of the Constitution when taxed by the city of Mobile.

In 1871 the question of taxation of imports from foreign countries in the original packages came again before the Supreme Court in the case of *Low et al. v. Austin* (80 U. S., 29), and it was there held—

Goods imported from a foreign country, upon which the duties and charges at the custom-house have been paid, are not subject to State taxation whilst remaining in the original cases, unbroken and unsold, in the hands of the importer, whether the tax be imposed upon the goods as imports, or upon the goods as part of the general property of the citizens of the State, which is subjected to an ad valorem tax.

It will be seen that the court here uses the expression "original cases, unbroken and unsold."

In *Cook v. Pennsylvania* (97 U. S., 566), decided in 1878, the same court held a tax imposed by the law of the State upon every auctioneer on the amount of his sales invalid when applied to the sale of imported goods in original packages. It was held that—

The statute of Pennsylvania of May 20, 1853, modified by that of April 9, 1859, requiring every auctioneer to collect and pay into the State treasury a tax on his sales, is, when applied to imported goods in the original packages, by him sold for the importer, in conflict with sections 8 and 10 of article 1 of the Constitution of the United States, and therefore void, as laying a duty on imports and being a regulation of commerce.

In *Schollenberger v. Pennsylvania* (171 U. S., 1) an act of the State of Pennsylvania prohibiting the sale of any oleaginous substance or compound of the same designed to take the place of butter was held unconstitutional so far as attempted to be enforced in the case of a sale of a 40-pound tub of oleomargarine imported from Rhode Island and sold as oleomargarine in the identical condition

in which imported. The law of the case is contained in the following syllabus:

Act No. 21 of the legislature of Pennsylvania, enacted May 21, 1885, enacting that "no person, firm or corporate body shall manufacture out of any oleaginous substance, or any compound of the same, other than that produced from unadulterated milk or of cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk, or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell or offer for sale, or have in his, her or their possession with intent to sell the same as an article of food," and making such act a misdemeanor, punishable by fine and imprisonment, is invalid to the extent that it prohibits the introduction of oleo-margarine from another State, and its sale in the original package.

The right of a State to prohibit the importation of a recognized article of commerce was distinctly denied by the Supreme Court in the case of *Bowman v. Chicago & Northwestern Railway Co.* (125 U. S., 465), decided in 1887. In that case the court declared invalid the statute of Iowa forbidding any railway company from bringing into the State intoxicating liquors unless previously furnished with a certificate from the county auditor that the consignee was authorized to sell them. It was held that—

A State can not, for the purpose of protecting its people against the evils of intemperance, enact laws which regulate commerce between its people and those of other States of the Union, unless the consent of Congress, express or implied, is first obtained.

Section 1553 of the Code of the State of Iowa, as amended by C. 143 of the Acts of the 20th General Assembly in 1886, (forbidding common carriers to bring intoxicating liquors into the State from any other State or Territory, without being first furnished with a certificate, under the seal of the auditor of the county to which it is to be transported or consigned, certifying that the consignee or person to whom it is to be transported or delivered is authorized to sell intoxicating liquors in the county), although adopted without a purpose of affecting interstate commerce, but as a part of a general system designed to protect the health and morals of the people against the evils resulting from the unrestricted manufacture and sale of intoxicating liquors within the State, is neither an inspection law, nor a quarantine law, but is essentially a regulation of commerce among the States, affecting interstate commerce in an essential and vital part, and, not being sanctioned by the authority, express or implied, of Congress, is repugnant to the Constitution of the United States.

It will be seen from the above that in this case the question of the right of the importer to sell the article so imported in the original package was not decided.

Two years later the question just stated was squarely presented to the court in the case of *Leisy v. Hardin* (135 U. S., 100), where it was held that the statute of Iowa prohibiting the sale of intoxicating liquors, except for certain prescribed purposes, was, as applied to the sale by the importer, in original packages or kegs, unbroken and unopened, of liquors manufactured in and brought from another State, unconstitutional and void, as repugnant to the Constitution of the United States granting to Congress the power to regulate commerce among the States. The law of the case was stated in the following syllabus:

A statute of a State, prohibiting the sale of any intoxicating liquors, except for pharmaceutical, medicinal, chemical or sacramental purposes, and under a license from a county court of the State, is, as applied to a sale by the importer, and in the original packages or kegs, unbroken and unopened, of such liquors manufactured in and brought from another State, unconstitutional and void, as repugnant to the clause of the Constitution granting to Congress the power to regulate commerce with foreign nations and among the several States.

Peirce v. New Hampshire, 5 How., 504, overruled.

In *Vance v. Vandercook Co.* (170 U. S., 438) the court reaffirmed its prior decisions upon the subject. The law of interstate commerce and the relation of the original package thereto is succinctly stated in the following syllabus to the opinion:

It is settled by previous adjudications of this court—

(1) * * *

(2) That the right to send liquors from one State into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress, and, hence, that a State law which denies such a right, or substantially interferes with or hampers the same, is in conflict with the Constitution of the United States.

(3) That the power to ship merchandise from one State into another carries with it, as an incident, the right in the receiver of the goods to sell them in the original packages, any State regulation to the contrary notwithstanding; that is to say, that the goods received by interstate commerce remain under the shelter of the interstate commerce clause of the Constitution, until by a sale in the original package they have been commingled with the general mass of property in the State. * * *

These decisions settled the respective rights of the Federal and State governments over goods moving in interstate and foreign commerce. It was determined that a State could not prevent the introduction into its territory of a recognized article of commerce; that it could not prevent the disposition by the importer in the original package of an article of commerce brought into its territory; and that Congress alone could regulate interstate commerce in such goods and the disposition of them in the original package by the importer. This is now the settled law. Hence the Food and Drugs Act asserts the right of the United States to prohibit the sale or disposition of adulterated and misbranded food and drugs imported into a State and remaining in the original package.

The next question to be determined is, At what time in the existence of imports does the power of Congress to regulate their disposition cease? Stated otherwise, When does an original package cease to be such and the regulation of its disposition pass beyond the jurisdiction of the Federal Government?

This question was answered in general terms by the Supreme Court in *Brown v. Maryland*, heretofore mentioned, as follows:

It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State.

In the case of *Low et al. v. Austin* (80 U. S., 29), decided in 1871, it was held that—

Goods imported do not lose their character as imports, and become incorporated into the mass of property of the State until they have passed from the control of the importer, or been broken up by him from their original cases.

Again in *Vance v. Vandercook Co.*, heretofore referred to, it was held that—

Goods received by interstate commerce remain under the shelter of the interstate commerce clause of the Constitution, until by a sale in the original packages they have been commingled with the general mass of property in the State.

In the case of *Heyman v. Southern Railway Co.* (203 U. S., 270), recently decided, it was said—

In the absence of Congressional legislation goods moving in interstate commerce cease to be such commerce only after delivery and sale in the original package.

From these decisions it will be seen that merchandise brought into a State is protected from State interference only so long as it remains in the original package, unbroken, and in the hands of the importer. If the importer sells the article in the identical condition and form in which imported, or if he breaks the package, it is no longer an original package, but has become merged in the mass of property in the State and subject to its laws.

Let these decisions be applied to a hypothetical case under the Food and Drugs Act:

A, a wholesale dealer in New York City, ships by express to B, in Hoboken, N. J., a box containing one dozen cans of adulterated condensed milk. B receives them into his store and shortly thereafter sells the box, just as received, to C.

B in this example would be liable to the penalties prescribed by the act, because he is the importer and sold the original package. But, should C, in due course, sell this identical box to D in Hoboken, he could not be successfully prosecuted under the act because he is not the importer. When the box was sold by B it lost the character of an original package and became merged in the property of the State, and the State only may regulate its disposition by C.

Suppose B, after receipt of the box, opens it and removes a can of the milk, which he sells to C. B is exempt from prosecution under the Food and Drugs Act for the sale of this can or for a subsequent sale of the remaining eleven, even though he sells the eleven in the box. By this act of removing one can he has broken the original package and in consequence destroyed the jurisdiction of the United States over it and over him.

But suppose B simply removes the top of the box to permit inspection, in no way disturbing the contents, replaces the top, and sells box and milk to C. Has B incurred the penalties prescribed by the Food and Drugs Act? Such a question has not been presented to the Supreme Court, but two cases very similar have been decided by the lower Federal courts.

The first case, *United States v. Fox* (Federal Cases No. 15155), decided in 1869, was a suit by the United States under the internal-revenue act of July 13, 1866 (14 Stat., 144), to recover the penalties therein prescribed for the sale of perfumery without affixing a proper stamp thereon. A proviso in the act prescribed that when imported perfumery was sold in the original and unbroken package in which the bottle or other inclosure was packed by the manufacturer the person so selling should not be liable to the aforesaid penalty.

Fox sold one small wooden box containing twelve 1½-ounce bottles of hair oil and a similar but larger box containing twelve bottles of pomade. He opened both boxes, so that the purchaser might examine the contents. The top of the smaller box was put on again before delivery without change of the contents. In the larger box, containing pomade, Fox, at the request of the purchaser, substituted three smaller bottles taken from the shelf of the store, and nailed up the box.

In respect to the smaller box of oil the court said—

Although the top of this box was taken off by the defendant Fox, it was only for the purpose of enabling the witness Quivey to ascertain the kind and quality of its contents, and before the sale and delivery to him it was put on again, with the contents unchanged in kind or quantity. Under these circumstances the defendant must be considered as selling an unbroken package, the contents of which were not then required to be stamped.

But as to the sale of the box of pomade, the court said—

The package was opened, and three bottles being taken out of it, it was sold with only the remaining nine bottles in it. This was a broken package, and so the court instructed the jury.

The verdict of the jury in favor of the defendant, Fox, was set aside on motion of the United States, upon the ground that the package of pomade was not an original package, the court holding—

Goods are sold "in the original and unbroken package" within the meaning of the act of July 13, 1866 (14 Stat., 144) although the package is opened for inspection, if closed again before delivery without the contents being changed.

In the other case, *In re McAllister* (51 Fed., 282), decided in 1892, the facts were these: Two men, emissaries of a butter dealer in Baltimore, went to the store of McAllister, a dealer in oleomargarine, and sought to buy butter. McAllister stated that he had none, but could supply oleomargarine. They requested him to remove the lid from the tub of oleomargarine that they might look at it. He did so, stating that he could not sell less than 10 pounds, as it reached him in the tub from Chicago. They purchased the tub and forthwith informed on him. He was duly tried in the State court and convicted. The State Court of Appeals affirmed the conviction, and McAllister applied to the Circuit Court of the United States for a writ of habeas corpus, on the ground that the sale of the tub of oleomargarine was a sale of an original package and beyond the power of the State to prohibit, which it sought to do in an act of the legislature. The court granted the writ and announced the proposition of law involved, in the following syllabus to the case:

Removing the lid of an original package of oleomargarine, so that a prospective buyer may examine its contents, is not such a breaking of the package as will destroy its original character.

In reaching the above conclusion the court said—

It is argued that the taking of the lid from the tub containing this oleomargarine was a breaking of the package so as to destroy its original character. This in no sense did it do. The goods had in no way become commingled with his property or the general property of the State (*Low v. Austin*, 13 Wall., 29). Anyone calling for oleomargarine with an honest purpose would have purchased this package as an original one, even if he knew it had had its lid lifted off once to see whether or not it held another substance than it purported to hold. The laws of the United States recognize oleomargarine as a merchantable article. Being such, while a State may perhaps regulate its sale, it can not prohibit its importation. The statute in question does this, and is unconstitutional, and in this respect void. The petitioner is discharged.

Upon the authority of these two cases, and following their reasoning, it must be concluded that B, in the last example (p. 8), is amenable to the penalties prescribed by the Food and Drugs Act. The first of these cases has another and important significance in connection with this decision, namely, the use of the word "unbroken" as synonymous with "original," thus substantiating the statement in the preliminary part of this discussion that the courts used the words interchangeably.

An example may be profitably introduced at this point to show how far goods moving in interstate commerce may be subjected to seizure under section 10 of the act.

A, a wholesale dealer in New York City, ships 50 barrels of flour to B in St. Louis, Mo. This flour may be seized, if adulterated or misbranded, at New York City after delivery to the carrier, or at any

point along the route, and may likewise be seized in St. Louis in the hands of the carrier before delivery to B, regardless of the question of whether or not it still remains in original packages, which, in the illustration, are the barrels.

After delivery of the flour to B it may still be seized, in his hands, if it remains in the barrels (the original packages) as shipped. But if B, after delivery to him, transfers the flour to 5-pound sacks, or otherwise breaks the barrels and commingles the flour with his stock of goods, the original packages have been destroyed, and it is no longer subject to seizure by the United States; nor are the barrels liable to seizure by the United States after B disposes of them to C in Missouri, even though no alteration is made in their condition.

Having now briefly reviewed the decisions of the Federal courts asserting the power of Congress to regulate the disposition of goods imported into a State from elsewhere, it is necessary to advert to the original question of what is an original package.

The first distinct definition of an original package by the Supreme Court was announced in the case of *Austin v. Tennessee* (179 U. S., 343), where it was held that—

Original packages are such as are used in *bona fide* transactions carried on between the manufacturer and wholesale dealers residing in different States.

This is hardly an accurate test to determine what is an original package in every case, and certainly can not restrict the provisions of sections 2 and 10 of the Food and Drugs Act of 1906 to transactions wholly between the manufacturer and the wholesale dealer. If so, the plain intent of the act could be easily defeated, in the case of sales by importers in original packages. An illustration will forcibly demonstrate the incompleteness of the definition when applied to the Food and Drugs Act.

It will scarcely be gainsaid that a can of tomatoes shipped by a person in no way connected with the manufacture or preparation thereof, from one State to a person in another State in no way engaged in the general sale of such commodities, is a shipment and receipt of an original package, and if the recipient disposes of it in any way, in the form in which it comes to him, he has violated the Food and Drugs Act.

The above language of the court is materially modified by its expressions in *Schollenberger v. Pennsylvania*, heretofore referred to, where it was said—

The right of the importer to sell can not depend upon whether the original package is suitable for retail trade or not. His right to sell is the same whether to consumers or to wholesale dealers in the article, provided he sells them in original packages.

A much more satisfactory and exact definition is contained in the decision in *Guckenheimer v. Sellers* (81 Fed., 997), where it was held that—

An original package within the meaning of the law of interstate commerce, is the package delivered by the importer to the carrier at the initial point of shipment, in the exact condition in which it was shipped.

And when this is followed by the expression of the court in the case *In re Beine* (42 Fed., 545), where it was said—

It is not perceived why, in the absence of a regulation by Congress to the contrary, the importer may not determine for himself the form and size of the packages he puts up for export.

it seems there could hardly arise a question in the enforcement of the provisions of the Food and Drugs Act under consideration that could not be tested by the foregoing definitions.

Concrete examples of what have been held to be original packages are found in several of the adjudicated cases:

Peirce v. New Hampshire (46 U. S., 504) : A barrel of gin.

Bowman v. Chicago & Northwestern Railway Co. (125 U. S., 465) : A barrel of beer.

Leisy v. Hardin (135 U. S., 100) : One-fourth barrel of beer; one-eighth barrel of beer; and a sealed case of beer.

Schollenberger v. Pennsylvania (171 U. S., 1) : 10 and 40 pound tubs of oleomargarine.

Rhodes v. Iowa (170 U. S., 412) : A box of liquors.

May v. New Orleans (178 U. S., 496) : Box, case, or bale in which were inclosed separate bundles and packages of dry goods.

Austin v. Tennessee (179 U. S., 343) : A large open basket in which were shipped numerous pasteboard boxes, each containing 10 cigarettes.

Plumley v. Massachusetts (155 U. S., 461) : A 10-pound package of oleomargarine.

In re Beine (42 Fed., 545) : A single bottle of beer or whisky packed, sealed, and nailed up in a pasteboard or wooden box.

In re Harmon (43 Fed., 372) : An open pine box containing several pint and quart bottles of whisky, each done up in a paper wrapper or box and sealed.

In re McAllister (51 Fed., 282) : A 10-pound tub of oleomargarine, even though its lid had been removed to allow inspection by the purchaser.

United States v. Fox (Federal Cases No. 15155) : A small wooden box containing twelve 1½-ounce bottles of oil, even though its top had been removed by the seller to permit inspection by the purchaser.

Guckenheimer v. Sellers (81 Fed., 997) : A single bottle of beer, if shipped singly; several bottles of beer fastened together and so shipped constitute one package; if several bottles be inclosed in one box, barrel, crate, or other receptacle, the box, barrel, crate, or other receptacle is the original package.

In *May v. New Orleans* (178 U. S., 496), decided in 1899, the Supreme Court held that where dry goods were imported into New Orleans from a foreign country in boxes, bales, and cases, each containing separate bundles of merchandise, separately marked and packed, which were so exposed for sale or taken out of the boxes, bales, and cases and sold, the boxes, bales, and cases were the original packages, and when the separate bundles were removed or exposed for sale the goods lost their distinctive character as imports and each parcel or bundle became a part of the general mass of property in the State and subject to local taxation. The syllabus of the case states the law as follows:

May & Co., merchants at New Orleans, were engaged in the business of importing goods from abroad, and selling them. In each box or case in which they were brought into this country, there would be many packages, each of which was separately marked and wrapped. The importer sold each package separately. The city of New Orleans taxed the goods after they reached the hands of the importer (the duties having been paid) and were ready for sale.
Held—

(1) That the box, case, or bale in which the separate parcels or bundles were placed by the foreign seller, manufacturer or packer was to be regarded as the original package, and when it reached its destination for trade or sale and was opened for the purpose of using or exposing to sale the separate parcels or bundles the goods lost their distinctive character as imports and each parcel or bundle became a part of the general mass of property in the State and subject to local taxation.

(2) * * *

The case *In re Harmon* (43 Fed., 372) presented the following facts: Harmon was agent in Sardis, Miss., for Jordan, a liquor dealer

in Memphis, Tenn. Panola County, in which Sardis is situated, was a "prohibition" county. Jordan shipped from Memphis to Harmon at Sardis a number of boxes containing bottles or flasks of whisky, some containing a pint, others a quart. These bottles or flasks had each a paper wrapper or box placed around it and sealed. These boxes so inclosed were by Jordan placed in ordinary pine boxes, *but without cover*, closely packed together. They were so shipped, and there was an understanding between Harmon and Jordan that the wooden boxes were to be returned to Jordan when all the bottles or flasks of whisky had been sold. (The fact that these boxes were comparatively valueless and not worth the return express charges exposed the agreement to return them to the suspicion of fraud.) Harmon received the liquors in this condition, and when a sale was effected would take each bottle out of the box and deliver to purchaser. He was convicted in the State court for selling liquor. Being imprisoned upon the judgment, he applied to the Circuit Court of the United States for a writ of habeas corpus, alleging the restraint of his liberty in violation of the Constitution of the United States, supporting this contention by the allegation that the whisky was sold in original packages and therefore beyond the jurisdiction of the State to prevent. The decision was as follows:

Where bottles of whisky, each sealed up in a paper wrapper and closely packed together in uncovered wooden boxes furnished by an express company, and marked, "To be returned," are shipped from one State to another, the boxes, and not the bottles, constitute the "original packages" within the meaning of decisions of the Supreme Court upon the interstate commerce provision of the National Constitution.

The case of *Guckenheimer et al. v. Sellers et al.* (81 Fed., 997) contains the following definition of an original package:

An original package, within the meaning of the law of interstate commerce, is the package delivered by the importer to the carrier at the initial point of shipment, in the exact condition in which it was shipped. In the case of liquors in bottles, if the bottles are shipped singly, each is an original package, but if a number are fastened together, and marked, or are packed in a box, barrel, crate, or other receptacle, such bundle, box, barrel, crate, or receptacle constitutes the original package.

In the *Austin* case (179 U. S., 343) there was presented the question whether or not a pasteboard box containing 10 cigarettes, over one end of which was securely pasted the United States revenue stamp, was an original package under the circumstances of that case and within the prior decisions of the court. The facts were—

The legislature of Tennessee in 1897 passed an act to prohibit the sale of any cigarettes or introduction of them into the State for that purpose. Austin was a merchant in the State and in the course of his business purchased from a factory in North Carolina a number of packages of cigarettes put up in small boxes, containing 10 cigarettes each, there being securely pasted over the end of each box a United States revenue stamp. When the order was received by the North Carolina factory, the packages above described were placed in a pile on the floor of their warehouse and the agent of the Southern Express Co. notified to come for them. An employee of the company brought with him a large basket without cover, belonging to his company, in which he gathered the individual boxes and took them to the station for carriage to Austin, in Tennessee. When the basket containing

the packages reached its destination in Tennessee, the agent of the company there took it to Austin's store and emptied the packages on the counter of the store and took the basket away with him. Austin immediately exposed the cigarettes for sale and sold one package to a customer. He was indicted, tried, and convicted for this sale. His defense was that the package sold was an original package, and that the law of the State so far as applicable to this transaction was unconstitutional as an interference with interstate commerce. Upon appeal to the Supreme Court of the State the conviction was affirmed. He then sued out a writ of error to the Supreme Court of the United States. A majority of the Justices held that the original package in this case was the basket in which the packages were transported, and not the package sold. They therefore affirmed the judgment of the State court.

The results of the conclusions reached are expressed in the syllabus, as follows:

Original packages are such as are used in *bona fide* transactions carried on between the manufacturer and wholesale dealer residing in different States. Where the size of the package is such as to indicate that it was prepared for the purpose of evading the law of the State to which it is sent, it will not be protected as an original package against the police laws of that State.

Where cigarettes were imported in paper packages of three inches in length and one and one-half in width, containing 10 cigarettes, unboxed but thrown loosely into baskets: *Held*, that such paper parcels were not original packages within the meaning of the law, and that such importations were evidently made for the purpose of evading the law of the State prohibiting the sale of cigarettes.

The court rested its decision in this case more upon the palpable fraud upon the laws of Tennessee than upon any attempt to analyze the definition of an original package. So in *Cook v. Marshall County, Iowa* (196 U. S., 261), the boxes of cigarettes in the same form as in the Austin case were shoveled into the car in Missouri and delivered to Cook in Iowa in that condition. They were not inclosed in any receptacle, but shipped in bulk. The State imposed a tax of \$300 on the business of selling cigarettes. Cook resisted the payment upon the ground that he sold only in original packages and was therefore protected by the interstate commerce clause of the Constitution. Having lost in the State courts, he prosecuted a writ of error to the Supreme Court of the United States, where it was held that Cook was not exempt from the tax; that the manner of dealing disclosed by the facts in the case was a gross fraud upon the laws of Iowa, and the court would not lend its aid to such a proceeding. The question of what was an original package in the case was a matter of minor importance, though the court said the term original package did not include packages which could not be commercially transported from one State to another. The syllabus contains the law, as follows:

The term original package is not defined by statute, and while it may be impossible to judicially determine its size or shape, under the principle upon which its exemption while an article of interstate commerce is founded, the term does not include packages which can not be commercially transported from one State to another.

While a perfectly lawful act may not be impugned by the fact that the person doing it was impelled thereto by a bad motive, where the lawfulness or unlawfulness of the act is made an issue, the intent of the actor may be material in characterizing the transaction, *and where a party, in transporting goods from*

one State to another, selects an unusual method for the express purpose of evading or defying the police laws of the latter State the commerce clause of the Federal Constitution can not be invoked as a cover for fraudulent dealing.

This court adheres to its decision in *Austin v. Tennessee*, 179 U. S., 343, that small pasteboard boxes each containing 10 cigarettes, and sealed and stamped with the revenue stamp, whether shipped in a basket or loosely, not boxed, baled, or attached together, and not separately or otherwise addressed but for which the express company has given a receipt and agreement to deliver them to a person named therein in another State, are not original packages and are not protected under the commerce clause of the Federal Constitution from regulation by the police power of the State.

From a consideration of all the decisions and upon the basis of common understanding of the words, it seems that an original package within the meaning of the Food and Drugs Act is the unit, complete in itself, delivered by the shipper to the carrier, addressed to the consignee, and received by him in the identical condition in which it was sent, without separation of the contents in any manner. This unit may be a hogshead containing 500 bottles of wine, or a single can of tomatoes, or it is a small ounce phial of some drug if shipped to the consignee in that form; and if the consignee sells or gives away any one of the three in the unaltered condition in which he received it, if the contents be adulterated or misbranded, he has violated the act.

This presentation of the decisions of the courts would not be complete, and certainly not satisfactory, if some reference were not made to three very important decisions, two of the Supreme Court of the United States—*Plumley v. Massachusetts* (155 U. S., 461) and *Crossman v. Lurman* (192 U. S., 189)—and one of the Circuit Court of Appeals of the Sixth Circuit—*Arbuckle Bros. v. Blackburn, Dairy and Food Commission of Ohio* (113 Fed., 616). But they are referred to here simply to show that, so far as the Food and Drugs Act of June 30, 1906, is concerned, they are in a sense obsolete. These decisions were rendered prior to the passage of the aforesaid act, and asserted the right of the States to prohibit the sale and traffic in adulterated and misbranded foods and drugs even in original packages. They were rendered in the absence of Congressional action covering the entire subject-matter of interstate commerce in foods and drugs. Since then Congress has assumed its full authority over the subject by the passage of the act of June 30, 1906.

The decisions proceeded upon the well-recognized principle that in the absence of complete Federal regulation of interstate and foreign commerce effect will be given to the legitimate exercise of the police powers of the States, even though incidentally affecting that commerce. There can scarcely be a doubt that since the enactment of the Food and Drugs Act all power of the States over interstate commerce in foods and drugs, including the regulation of importations and sales in original packages, has been abrogated, and the subject is entirely and exclusively under the control of the Federal Government. That such is the state of the law is clearly and succinctly shown by the following quotation from the opinion of Justice Harlan in the case of *Reid v. Colorado*, 187 U. S., at page 146:

It is quite true, as urged on behalf of the defendant, that the transportation of live stock from State to State is a branch of interstate commerce and that any specified rule or regulation in respect of such transportation, which Congress may lawfully prescribe or authorize and which may properly be deemed a regulation of such commerce, is paramount throughout the Union. So that when the entire subject of the transportation of live stock from one State to

another is taken under direct national supervision and a system devised by which diseased stock may be excluded from interstate commerce, all local or State regulations in respect of such matters and covering the same ground will cease to have any force, whether formally abrogated or not; and such rules and regulations as Congress may lawfully prescribe or authorize will alone control. * * * The power which the States might thus exercise may in this way be suspended until national control is abandoned and the subject be thereby left under the police power of the States.

This case involved the validity of a certain act of the State of Colorado designed to prevent the introduction of infectious and contagious diseases among the cattle of the State. The defendant contended that the act was void as an interference with interstate commerce, and because the subject-matter had already been covered by an act of Congress. The Supreme Court sustained the validity of the act of Colorado, because a legitimate exercise of the police power in the absence of complete regulation by Congress covering the matter. The act of Congress in force at that time did not attempt a full and complete regulation of interstate transportation of animals.

The principle that the State police laws affecting interstate and foreign commerce must yield to the regulation of Congress when it shall assume jurisdiction is well and tersely stated by Freund in his work on Police Power, at page 82, as follows:

SEC. 85. The State may enact measures for the protection of safety, order, and morals, though affecting foreign and interstate commerce, subject to the following principles:

1. Every measure of State legislation, however legitimate in itself, yields to positive regulation of interstate or foreign commerce by act of Congress, inconsistent with such measure or intended fully to cover the same matter.

* * *

F. I. D. 87 (Feb. 13, 1908).¹

LABELING OF CORN SIRUP.²

We have each given careful consideration to the labeling, under the pure-food law, of the thick, viscous sirup obtained by the incomplete hydrolysis of the starch of corn, and composed essentially of dextrose, maltose, and dextrine.

In our opinion it is lawful to label this sirup as "Corn Sirup;" and if to the corn sirup there is added a small percentage of refiner's sirup, a product of the cane, the mixture, in our judgment, is not misbranded if labeled "Corn Sirup with Cane Flavor."

F. I. D. 88 (Feb. 17, 1908).

PRIVATE IMPORTATIONS.

Recently certain shipments of foods and of drugs have been offered for entry into the United States, and an examination has disclosed the fact that they were adulterated or misbranded under the Food and Drugs Act. The shipments were refused entry into the United States, whereupon representations were made to the department that

¹ Signed by the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor.

² See *United States v. 779 Cases of Molasses*, p. 218, *post*; and *McDermott et al. v. Wisconsin*, p. 629, *post*.

the materials were for consumption by importers or for free distribution among the friends or employees of the importers, and not for trading purposes, and the department was requested on this account to allow the entry of the misbranded or adulterated food or drug.

The provisions of the Food and Drugs Act make no distinction between foods and drugs imported for consumption or free distribution by the importer and foods and drugs imported for trading purposes. The law provides that no misbranded or adulterated foods or drugs shall be admitted.

Notice is given that these so-called private importations will be subjected to the same restrictions as ordinary imports.

F. I. D. 89 (Feb. 28, 1908).¹

AMENDMENT TO FOOD INSPECTION DECISION 76, RELATING TO THE USE IN FOODS OF BENZOATE OF SODA AND SULPHUR DIOXID.²

The question of the addition to food of minute quantities of benzoate of soda and of sulphur dioxide will be certified immediately by the Secretary of Agriculture to the referee board of consulting scientific experts.

Pending determination by the referee board of the wholesomeness or unwholesomeness of these substances, their use will be allowed under the following restrictions:

Benzoate of soda, in quantities not exceeding one-tenth of 1 per cent, may be added to those foods in which generally heretofore it has been so used. The addition of benzoate of soda shall be plainly stated upon the label of each package of such food.

No objection will be made to foods which contain the ordinary quantities of sulphur dioxide, if the fact that such foods have been so prepared is plainly stated upon the label of each package.

An abnormal quantity of sulphur dioxide placed in food for the purpose of marketing an excessive moisture content will be regarded as fraudulent adulteration, under the Food and Drugs Act of June 30, 1906, and will be proceeded against accordingly.

Food Inspection Decision No. 76, issued July 13, 1907, is hereby amended accordingly.

F. I. D. 90 (Apr. 8, 1908).

THE LABELING OF FOODS AND MEDICINAL MIXTURES FOR STOCK AND POULTRY.³

The department has frequently received inquiries in regard to the labeling of bran, of which the following is a fair sample:

Can the screenings of wheat, consisting principally of shrunken seed, etc., be put in the bran and it still be called bran, etc.

Since the above is clearly in violation of those provisions of the law requiring that a food product be true to label, the department is of the opinion that it will be necessary to label a such mixture as "Bran and Screenings."

¹ Signed by the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor.

² See also F. I. D. 104, amending this decision.

³ See also F. I. D. 124 on stock feed.

It has recently come to the attention of the department that a number of the cattle and poultry foods sold on the American market contain enough poisonous weed seeds, such as corn cockle and jimson weed (Jamestown weed), to have a more or less toxic effect on poultry, cattle, etc. Poultry and cattle foods which contain poisonous weed seeds in appreciable quantities will be considered as adulterated in accordance with those provisions of the food and drugs act, June 30, 1906, forbidding the presence of poisonous or deleterious ingredients.

The department has been asked by the manufacturers of medicinal mixtures for poultry, cattle, etc., whether such mixtures may, under the law, be labeled respectively as cattle and poultry foods. It is thought, first, that the words "Cattle Food" or "Poultry Food" should apply to cattle or poultry foods which are not mixed with any condimental or medicinal substance or substances; second, that mixtures of cattle and poultry food materials, with small quantities of condiments, such as anise seed, ginger, capsicum, etc., should be labeled as "Condimental Cattle Food," or "Condimental Poultry Food;" and third, that mixtures of cattle-food materials with medicinal substances, such as arsenic, sulphate of iron (copperas), etc., should not be labeled as foods, but as medicines, or remedies. For example, under the latter ruling, a cattle food mixed with medicinal substances, such as arsenic, copperas, etc., should be plainly labeled as a remedy, or medicine, so as to differentiate clearly such a substance from a cattle-food material unmixed with medicinal agents.

F. I. D. 91 (Apr. 18, 1908).

THE LABELING OF MOCHA COFFEE.¹

In Food Inspection Decision 82 the department has indicated its views with respect to the restrictions which it is necessary to place upon the sale of coffees coming from the Dutch East Indies, particularly with respect to such coffees as are known under the name of "Java" coffee.

Among the coffees largely sold upon the American market are those which go by the name of "Mocha." Because of the commercial value of the true Mocha bean, it becomes necessary to indicate the restrictions which must be placed upon the coffees put upon the market and sold under the name of "Mocha."

This matter has been fully investigated and valuable information obtained through the Department of State and from the consul and consular agent in those districts where the true Mocha coffee is grown and whence it is shipped to America and other parts of the world.

The following quotations are taken from the report submitted to the Department of State from the consular agent at Aden under date of January 3, 1908:

The Mocha coffee is produced in that district of southern Arabia known as "Yemen." The latter is a strip of territory commencing at a point on the Red Sea a little north of the port of Hodeidah and extending first southeast to the Strait of Bab-el-Mandeb and then east nearly to Aden. Yemen is, with the exception of a narrow fringe of land along the Red Sea and the Gulf of Aden, rugged and mountainous, embracing innumerable small, elevated valleys of high

¹ See regulation 19 of the rules and regulations; and *United States v. Thomson & Taylor Spice Co.*, p. 553, *post*.

fertility which are irrigated by waters from the melting snows. This is the coffee district of Arabia.

The term "Mocha" was bestowed upon "Yemen" coffee early in the last century, when Mocha was the port from which all Arabian coffee was shipped. The formation of huge sandbars in the Red Sea off Mocha, practically barring out all shipping, caused the port to be abandoned, and its trade went to Hodeidah and Aden, the bulk of it going to the latter place.

As all of the coffee raised in Yemen may properly be called "Mocha" coffee, all coffee shipped from the port of Hodeidah comes within such classification. With regard to that exported from Aden, however, the case is somewhat different. There is a coffee grown in the upland regions of Abyssinia, in the vicinity of Harrar, which is known locally and to the coffee trade of the world as "Longberry" or "Harrar" in contrast with that of Mocha, which is sometimes called the "Shortberry." The colors of both coffees are practically the same, but the Abyssinian product has a raw, rank, leathery odor, while that of the berry grown in Arabia is delicate and agreeable. The Harrar berry is much longer than the Mocha one, besides being much less regular in form.

While a considerable quantity of Abyssinian coffee is brought to Aden for shipment to Europe and to the United States, it is doubtful whether very little of it, if any, is exported as being Mocha coffee, the local merchants as a rule dealing in both grades of coffee and being very careful of the reputation of their houses. In Aden the only way in which a dishonest dealer might adulterate Mocha coffee would be by mixing it with the Abyssinian article. Such a proceeding would be at best but a clumsy fraud and would be readily and rapidly detected. It is safe to say that practically all of the coffees shipped directly from Hodeidah or Aden to the United States and labeled "Mocha" are pure and unadulterated.

The board is of the opinion that the term "Mocha," as applied to coffee, should be restricted as indicated in the above communication from the consular agent at Aden, that is, to coffee grown in that part of Arabia to the north and east of Hodeidah, known as Yemen.

F. I. D. 92 (May 1, 1908).¹

THE USE OF COPPER SALTS IN THE GREENING OF FOODS.

As provided in Food Inspection Division 76, the Secretary of Agriculture has considered the question of foods greened with copper salts. It has been decided that foods so treated are not entitled to entry into the United States under the provisions of section 11 of the Food and Drugs Act. Inasmuch as contracts have already been made for the present year's pack, until January 1, 1909, all vegetables greened with copper salts, but which do not contain an excessive amount of copper and which are otherwise suitable for food, will be allowed entry into the United States, if the label bears the statement that sulphate of copper or other copper salts have been used to color the vegetables. On and after January 1, 1909, no foods greened with copper salts will be allowed entry into the United States.

F. I. D. 93 (May 12, 1908).²

AMENDMENT TO REGULATION 34 OF THE RULES AND REGULATIONS.

Certain classes of articles are offered for entry into this country which, under certain conditions, are ordinarily used for food pur-

¹ Signed by the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor. See also F. I. D. 76, 102, 148 and 149.

² Approved by the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor. See regulation 34 of the rules and regulations.

poses. The articles in question are used also for technical purposes. An example of such a product is the nutmeg. The mature and sound nutmeg is used for food purposes, while the defective nutmeg is used for the preparation of nutmeg oil, which has a technical use as an odoriferous principle. The defective nutmeg is not fit for food, but, on the other hand, is as well or even better suited for preparing oil.

Under regulation 34 as it now stands, shipments of products which are ordinarily used for food, but which in the particular case are intended for use in the arts, must be so denatured as to render them unfit for food purposes, and the invoice accompanying the shipment must declare the technical use. It has proved impracticable to have all such products denatured before they are offered for entry into the United States.

The Board of Food and Drug Inspection recommends a change in regulation 34 of Circular 21 of the Office of the Secretary, the amended regulation to become effective on the date of issue, and to read as follows:

REGULATION 34, DENATURING.

(Section 11.)

Unless otherwise declared on the invoice, all substances ordinarily used as food products will be treated as such.¹ Shipments of substances ordinarily used as food products intended for technical purposes should be accompanied by a declaration stating that fact. Such products should be denatured before entry, but denaturing may be allowed under customs supervision, with the consent of the Secretary of the Treasury, or the Secretary of the Treasury may release such products without denaturing, under such conditions as may preclude the possibility of their use as food products.

F. I. D. 94 (May 13, 1908).

THE LABELING OF MEDICINAL AND TABLE WATERS.

The department has received many letters from various water manufacturers and mineral water dealers asking which waters it will be necessary to label as "artificial" or "imitation." It is thought that all manufactured waters should be labeled as either artificial or imitation, the choice of words being left to the manufacturer, and applying to waters contrived by human art and not made in imitation of a natural water, as well as to those so contrived and made in imitation of a natural water. A water which is designated by some name alone, without any characterizing adjective to tell whether it is natural, imitation, or artificial, will be considered a natural water. It is suggested that the words "artificial" or "imitation" be in as large type as the name of the water in question, and on a uniform background.

All waters which, though natural in the beginning, have anything added to them or abstracted from them after they come from source, should either be labeled as "artificial" or should be so labeled as to indicate that certain constituents have been added to or extracted from them. It is suggested that the word "artificial" or the above explanation, as the case may be, should appear in as large type as the name of the water in question and on a uniform background.

¹ See *United States v. 13 Crates of Frozen Eggs*, p. 669, *post*.

The following examples are explanatory of the above principles. If lithia be added to a natural water, the water should either be labeled as "artificial lithia water," as "water artificially lithiated," or as "water treated with lithia." Again, if carbon dioxid be added to a natural water, whether the carbon dioxid be of the manufactured variety or collected from the spring itself, the water should either be labeled as "artificially carbonated water," "water artificially carbonated," "water treated with carbon dioxid," or "contains added carbon dioxid."

No water should be labeled as a natural water unless it be in the same condition as at source, without additions or abstractions of any substance or substances.

No water should be labeled as "medicinal water" unless it contains one or more constituents in sufficient amounts to have a therapeutic effect from these constituents when a reasonable quantity of the water is consumed. No water should be named after a single constituent unless it contains such constituent in sufficient amounts to have a therapeutic effect when a reasonable amount of the water is consumed.¹

No manufactured water should bear upon the label any design or device that would lead the consumer to believe that the water is a natural one. Among such designs may be mentioned pictures of springs, fountains, woodland streams, etc.

No water should be characterized by a geographical name which gives a false or misleading idea in regard to the composition of said water. For example, it would not be correct to designate a water as "Lithia water" merely because the water came from Lithia, Fla., or Lithia, Mass.¹

Manufactured water may be named after a natural water in case the words "imitation" or "artificial" are used, but such manufactured waters must clearly resemble in chemical composition the natural waters after which they are named.

In accordance with regulation 19 (*c*) and (*d*), no natural American spring water should be named after a foreign spring, unless the name of the foreign spring has become generic and indicative of the character of the water, except to indicate a type or style, and then only when so qualified that it could not be offered for sale under the name of the foreign spring. In these cases, the State or Territory where the spring is situated should be stated on the principal label.

Inasmuch as mineral waters are largely purchased because of their supposed freedom from contamination, any showing such contamination will be considered as adulterated and therefore in violation of the Food and Drugs Act.

F. I. D. 95 (May 13, 1908).

THE USE OF NEUTRAL SPIRITS DISTILLED FROM BEET SUGAR MOLASSES IN THE PREPARATION OF WHISKY COMPOUNDS AND IMITATION WHISKIES.²

The labeling of whisky compounds and imitation whiskies, in the preparation of which neutral spirit distilled from beet sugar mo-

¹ See United States *v.* Seven Cases of Buffalo Lithia Water, p. 697, *post*.

² Revoked by F. I. D. 113. See F. I. D. 45, 65, 98, 113, 118, and 127 on the labeling of whiskies; also opinions of the Attorneys General, pp. 775, 783, 797, *post*; Report of the Solicitor General, p. 818, *post*; and Decision of the President, p. 831, *post*, on the same subject.

lasses has been used, will be governed by the opinion of the Attorney General, dated May 11, 1908.

OPINION OF THE ATTORNEY GENERAL.

MAY 11, 1908.

The honorable the SECRETARY OF AGRICULTURE.

SIR: I have the honor to acknowledge the receipt of your letter of the 28th ultimo, inclosing copy of a hearing had before you on the subject of spirits distilled from beet sugar molasses, in which you request an expression of my opinion on the question whether it is "allowable under the Food and Drugs Act to use in the place of neutral or silent spirits, prepared from grain, a neutral or silent spirit prepared from fermented beet sugar molasses in the preparation of whisky compounds and imitation whiskies."

In reply, I beg to advise you that there is no provision of the Food and Drugs Act which would prevent the use either in whisky compounds or imitation whiskies of neutral spirits distilled from beet sugar molasses, provided such compound or imitation whisky is properly labeled. Neither do I think that the President's direction to you of April 10, 1907 (F. I. D. 65, p. 2), which was referred to at the hearing, that whisky should be labeled in accordance with my opinion of that date, is to be properly construed as limiting the use of the term "compound of whisky" to cases where the whisky is compounded with a grain distillate.

While it is true that in this direction it is said that "a mixture of straight whisky and ethyl alcohol * * * will be labeled as compound of, or compounded with, pure grain distillate," it is plain that this was only intended to apply to the case of such compounds as are set forth in the opinion whose enforcement was directed, and that it was not intended either to limit the use of the term "compound of whisky" to the case where the whisky was compounded with a grain distillate, or to require the use of this particular label where another distillate had in fact been used in the compound.

By reference to my opinion of April 10, 1907, whose enforcement was thus directed, it will be seen that while it was stated that "a mixture of whisky with neutral spirit must be deemed a 'compound' and not a 'blend,' although the spirit *may* be a distillate from the same substance used to furnish the whisky" (F. I. D. 65, p. 13; 26 Opin., 228), and while the particular specimen label of a compound whisky which was suggested related to a compound in which it was "*assumed* that both the whisky and the alcohol are distilled from grain" (F. I. D. 65, p. 16; 26 Opin., 231), it plainly appears from the entire opinion that the particular kind of compounded whisky which was considered was used for illustrative purposes merely and that it was not intended to limit in any way the use of the term "compound of whisky" to those compounds in which the distillate mixed with the whisky is in itself produced from grain, or to require the use of the specimen label suggested in a case where the mixture is with a distillate produced from other substances than grain.

I am therefore clearly of the opinion that there is nothing whatever either in the Food and Drugs Act itself, or in my former opinion, or in the President's direction for its enforcement, which would limit whisky compounds to cases where the neutral spirits with which the

whiskies are mixed are derived from grain distillates, and that the compound to which you refer, if otherwise a genuine compound of whisky, may be properly placed upon the market under the Food and Drugs Act provided it is properly labeled so as to show the true character of the other distillate with which the whisky is compounded.

Respectfully,

CHARLES J. BONAPARTE,
Attorney General.

F. I. D. 96 (May 20, 1908).

SERIAL NUMBER GUARANTY.¹

As a result of the numerous requests for specific information on various points connected with the filing of general guaranties with the department, as well as on the use of serial numbers after they have been assigned, the following general instructions bearing on these questions are issued for the guidance of those interested:

(A) For information regarding the serial number guaranty, see Rules and Regulations for the Enforcement of the Food and Drugs Act (Circular 21), regulation 9, and Food Inspection Decisions 40, 70, 72, and 83.

(B) Articles to be guaranteed may be referred to in the guaranty in the following ways:

(1) By name.

(2) By use of general terms. For example, proprietary medicines, extracts, carbonated waters, etc., using the proper terms to cover the line or lines sold.

(3) By stating in the space reserved for listing articles "all articles which are now or which may hereafter be manufactured, packed, distributed or sold by -----," in which case the serial number can be used on all foods or drugs, subject to the act, manufactured or owned and sold by the guarantor.

(C) The formulæ of preparations are not required to be given.

(D) The serial number guaranty should not be used on articles not entitled to bear such a guaranty: For example,

(1) Those of a character which are not included in the definition of articles within the purview of the act as given in section 6 found on page 17 of Circular 21.

(2) Those subject to the meat inspection law, i. e., meat and meat food products of domestic origin or manufacture derived from cattle, swine, sheep, and goats. (Imported meat and meat food products are subject to the Food and Drugs Act and may be guaranteed by means of a serial number or guaranty.)²

(3) Those used in the arts and for technical purposes.

(E) A serial number assigned to a guaranty can be used on any article covered therein to which the act applies. (See B.)

(F) Products not covered by the guaranty on file at the department can be added thereto by executing another guaranty covering them to be filed as a supplement to the original instrument. (See B.)

(G) The serial number guaranty can be printed either directly on the principal label or appear on a supplemental label or paster attached to the goods.

¹ See regulation 9, p. 19, *ante*, and F. I. D. 40, 62, 70, 72, 83, and 99 on guaranties; also F. I. D. 153, May 5, 1914, amending regulation 9.

² Domestic meats and meat food products are also subject to the Food and Drugs Act; see opinion of the Attorney General, p. 800, *post*.

(H) Only a resident of the United States can make a valid guaranty. (See Food Inspection Decision 62.)

(I) The general guaranty filed with the department must be executed by the person, company, association, or corporation who assumes responsibility for the goods, or by his or its agent thereunto lawfully authorized, and the authority of such agent must plainly be made to appear when the guaranty is offered to be filed.

(J) Full information relative to the signing of the guaranty instrument appears at the bottom of the blank form of guaranty.

(K) The signature should be acknowledged before a notary public or other official authorized to administer an oath. The seal of such official should always be affixed to the document.

F. I. D. 97 (Oct. 15, 1908).

"SOAKED CURD" CHEESE.

A change has been introduced in certain portions of the United States in the manufacture of cheese. This change consists in soaking the curd at one stage of the process, in cold water. After drainage, the curd is then salted and put to press.

This treatment is carried on solely for fraudulent purposes. First, it introduces an undue amount of water in the cheese, thus increasing the weight, and, second, it gives a soft texture and an appearance of superior quality, which deceives the purchaser as to its real nature. Cheese thus produced is of inferior quality, for it develops less of the desirable cheese flavor than it otherwise would, and it deteriorates greatly in quality before the curing process is complete.

Under the Food and Drugs Act this type of cheese can not enter interstate commerce nor be sold in the District of Columbia or the Territories under the name of "Cheese" unless this name be further characterized. In the opinion of the Board, this product should be labeled "Soaked Curd Cheese."

F. I. D. 98 (Dec. 4, 1908).

THE LABELING OF WHISKY COMPOUNDS.¹

The labeling of whisky compounds, under the Food and Drugs Act of June 30, 1906, will be governed by the opinion of the Attorney-General, dated December 1, 1908, published herewith.

OPINION OF THE ATTORNEY-GENERAL.

DECEMBER 1, 1908.

The honorable the SECRETARY OF AGRICULTURE.

SIR: I am duly in receipt of your letter of this date. In this you call my attention to a passage in my opinion of April 10, 1907, addressed to the President, which passage is in the words following:

I conclude that a combination of whisky with ethyl alcohol, supposing, of course, that there is enough whisky in it to make it a *real* compound and not

¹ Revoked by F. I. D. 113. See F. I. D. 45, 65, 95, 113, 118 and 127 on the labeling of whiskies; also opinions of the Attorneys General, pp. 775, 783, 797, *post*; Report of the Solicitor General, p. 818, *post*; and Decision of the President, p. 831, *post*, on the same subject.

a mere semblance of one, may be fairly called "Whisky," provided the name is accompanied by the word "Compound" or "Compounded," and provided a statement of the presence of another spirit is included in substance in the title—and you ask me how much whisky there must be in a mixture of whisky and neutral spirits to fairly entitle this mixture to be called a "Compound" or "Compounded" whisky, or, as stated in your letter, "whisky: a compound of pure grain distillates."

In the passage in question I stated that there must be, in any such a mixture, "enough whisky * * * to make it a *real* compound and not a mere semblance of one." In the absence of any legislative provision or judicial determination on this subject, the proportion of whisky necessary for the purpose in question can be stated only tentatively and for the time being; and a selection of any particular fraction of the whole as a necessary proportion must be, at least in appearance, somewhat arbitrary. I have, however, very carefully examined the evidence on this subject submitted by your department, and, after full consideration of such evidence, have reached the conclusion that, until better informed in the premises from the action of the Congress or of the courts, this department will not advise a prosecution on the ground of violation of law in using any one of the three labels above suggested or any substantial equivalent therefor when the amount of whisky in the mixture equals or exceeds one-third in volume of the spirituous content; that is to say, in the case you mention, one-third of the whisky and neutral spirits combined.

Very respectfully,

CHARLES J. BONAPARTE,
Attorney General.

F. I. D. 99 (Dec. 8, 1908).¹

CHANGE IN FORM OF GUARANTY LEGEND.²

Section 9 of the Food and Drugs Act, June 30, 1906, provides that no dealer shall be prosecuted under the provisions of the act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same are not adulterated or misbranded within the meaning of the act. There is a further provision that the guarantor shall, if the goods be adulterated or misbranded within the meaning of the act, be amenable to the prosecutions, fines, and other penalties which would attach in due course to the dealer.

Section *b* of regulation 9 provides that a general guaranty may be filed with the Secretary of Agriculture by the manufacturer or dealer and be given a serial number, which number should appear on each and every package of goods sold under such guaranty, with the words "Guaranteed under the Food and Drugs Act, June 30, 1906."

It is obvious from a reading of section 9 of the act that the guaranty is in no sense a guaranty by the Government, and that it is merely an

¹Amending section *b* of regulation 9. Approved by the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor.

²See regulation 9, p. 19, *ante*, and F. I. D. 40, 62, 70, 72, 83, and 96 on guaranties; also F. I. D. 153, May 5, 1914, amending regulation 9.

assumption of responsibility for the character or labeling of the goods by the manufacturer, jobber, or packer. Yet, notwithstanding this plain fact, attempts have been made by some unscrupulous persons to cause the public to interpret the phrase "Guaranteed under the Food and Drugs Act, June 30, 1906." as a guaranty by the Government that the goods upon which the phrase appears are pure and conform, in all respects, with the provisions of the act. This misrepresentation has been scattered broadcast in prominent advertisements in the press, and by means of circulars and billboard posters. Even in the absence of such misrepresentation there can be no doubt that the phrase, unfortunately, is misleading, and is therefore prohibited by the law and should be changed. The Commissioner of Patents has refused to register trade-marks of which the phrase formed a part, on the ground that it is misleading and under the law can not be registered. The Board of Food and Drug Inspection for some time has realized that the wording of the guaranty legend should be changed, but it has also been mindful of the fact that the manufacturers and jobbers of the United States have, in the aggregate, large sums of money invested in labels and plates, upon which appears the legend in its present form, a form indorsed by the regulations and copied therefrom in good faith by the owners of these labels and plates. Entirely apart from the expense and loss of property, it is a fact that a change in the form of the legend, without due notice, would seriously embarrass business interests, because the printing and lithographing of new labels will require considerable time.

As a solution of the question, the board recommends that the guaranty legend be changed so as to show plainly that the guaranty is that of the manufacturer and not of the Government, that the old form of labels now in use representing guaranties already filed with the Department of Agriculture shall be recognized for a term of two years, and that for all guaranties filed with the Department of Agriculture on and after January 1, 1909, the guaranty legend shall read "Guaranteed by [insert name of guarantor] under the Food and Drugs Act, June 30, 1906."

Accordingly the the following amendment is proposed to regulation 9 of the Rules and Regulations for the Enforcement of the Food and Drugs Act:

Section 6 of regulation 9 is hereby amended to read as follows:

(b) A general guaranty may be filed with the Secretary of Agriculture by the manufacturer or dealer and be given a serial number, which number shall appear on each and every package of goods sold under such guaranty with the words "Guaranteed by [insert name of guarantor] under the Food and Drugs Act, June 30, 1906."

This amendment shall become and be effective on and after January 1, 1909. Labels bearing the form of guaranty legend provided in the original regulations and representing guaranties now on file with the Department of Agriculture may be used for a period of two years, but it is suggested that, as new labels are prepared, the change in the form of guaranty legend should be made.

F. I. D. 100 (Dec. 9, 1908).

BLEACHED FLOUR.¹

Flour bleached with nitrogen peroxid, as affected by the Food and Drugs Act of June 30, 1906, has been made the subject of a careful investigation extending over several months.

A public hearing on this subject was held by the Secretary of Agriculture and the Board of Food and Drug Inspection, beginning November 18, 1908, and continuing five days. At this hearing those who favored the bleaching process and those who opposed it were given equal opportunities to be heard.

It is my opinion, based upon all the testimony given at the hearing, upon the reports of those who have investigated the subject, upon the literature, and upon the unanimous opinion of the Board of Food and Drug Inspection, that flour bleached by nitrogen peroxid is an adulterated product under the Food and Drugs Act of June 30, 1906; that the character of the adulteration is such that no statement upon the label will bring bleached flour within the law; and that such flour can not legally be made or sold in the District of Columbia or in the Territories; or be transported or sold in interstate commerce; or be transported or sold in foreign commerce except under that portion of section 2 of the law which reads:

* * * *Provided*, That no article shall be deemed misbranded or adulterated within the provisions of this act when intended for export to any foreign country and prepared or packed according to the specifications or directions of the foreign purchaser, when no substance is used in the preparation or packing thereof in conflict with the laws of the foreign country to which said article is intended to be shipped; * * *

In view of the extent of the bleaching process and of the immense quantity of bleached flour now on hand or in process of manufacture, no prosecutions will be recommended by this department for manufacture and sale thereof in the District of Columbia or the Territories or for transportation or sale in interstate or foreign commerce, for a period of six months from the date hereof.

F. I. D. 101 (Dec. 18, 1908).

BENZOATE OF SODA.²

Frequent inquiries have been received by the department in regard to the use of benzoate of soda in foods. The following is typical of this class of inquiries:

In F. I. D. 89, the position of the National authorities in regard to the use of benzoate of soda is to allow its use in food, pending the report of the Referee Board of Consulting Scientific Experts. Based upon Bulletin 84, Part IV, of the Bureau of Chemistry, issued subsequent to F. I. D. 89, certain manufacturers of food products are representing to the officials of the States, charged

¹ See *United States v. 420 Sacks of Flour*, p. 250, *post*; *United States v. 625 Sacks of Flour*, p. 285, *post*; *Lexington Mill & Elevator Co. v. United States*, p. 604, *post*; *United States v. Lexington Mill & Elevator Co.*, p. 701, *post*; *Shawnee Milling Co. v. Temple et al.*, p. 260, *post*; and *Alsop Process Co. v. James Wilson*, Secretary of Agriculture, p. 206, *post*.

² For other decisions on the use of benzoate of soda in foods, see F. I. D. 76, 89 and 104.

with the enforcement of food laws, and to the consuming public generally, that the United States Government has condemned the use of benzoate in foods. We write to ask the position of the department on this subject.

The department has not changed the position outlined in Food Inspection Decision 89. Pending the determination by the referee board of the wholesomeness or unwholesomeness of benzoate of soda, its use will be allowed under the following restrictions:

Benzoate of soda, in quantities not exceeding one-tenth of one per cent, may be added to those foods in which generally heretofore it has been used.

The addition of benzoate of soda shall be plainly stated upon the label of each package of such food.

F. I. D. 102 (Dec. 23, 1908).¹

ENTRY OF VEGETABLES GREENED WITH COPPER SALTS.

Until further notice, vegetables greened with copper salts, but which do not contain an excessive amount of copper and which are otherwise suitable for food, will be allowed entry into the United States, if the label bears the statement that sulphate of copper or other copper salts have been used to color the vegetables.

Food Inspection Decision No. 92 is amended accordingly.

F. I. D. 103 (Jan. 22, 1909).

THE LABELING OF TURPENTINE.²

The department has received a number of letters with reference to the proper labeling of the product generally known as "wood turpentine," etc., obtained by steam distilling or destructively distilling woods. Food Inspection Decision 58 recognizes that—

Products used in the arts and for technical purposes are not subject to the Food and Drugs Act * * * when plainly marked so as to indicate that they are not to be employed for food or medicinal purposes.³

It is held, therefore, that when wood turpentine is labeled "Not for Medicinal Use," etc., it is not subject to the Food and Drugs act. When not so labeled it is violation of section 7 of the Food and Drugs Act unless labeled "wood" or "stump" turpentine. Articles labeled "turpentine," "spirits of turpentine," or "gum turpentine," etc., must comply with pharmacopœial requirements; that is, they must be light oils of certain properties made by distilling the oleoresin of various species of *Pinus*. The word "wood" or "stump" should be in the same type and on the same background as the word "turpentine," thus being given equal prominence.

¹ Signed by the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor. See also F. I. D. 76, 92, 148, and 149.

² See *United States v. Lorick and Lowrance*, p. 357, *post*.

³ See *United States v. 13 Crates of Frozen Eggs*, p. 667, *post*.

F. I. D. 104 (issued March 3, 1909).¹AMENDMENT TO FOOD INSPECTION DECISIONS NO. 76
AND NO. 89, RELATING TO THE USE IN FOODS OF BENZOATE OF SODA.²

The Referee Board of Consulting Scientific Experts, composed of Dr. Ira Remsen, Dr. Russell H. Chittenden, Dr. John H. Long, Dr. Alonzo E. Taylor, and Dr. C. A. Herter, have reported upon the use of benzoate of soda in foods. The board reports, as a result of three extensive and exhaustive investigations, that benzoate of soda mixed with food is not deleterious or poisonous and is not injurious to health. The summary of the report of the referee board is published herewith.

It having been determined that benzoate of soda mixed with food is not deleterious or poisonous and is not injurious to health, no objection will be raised under the Food and Drugs Act to the use in food of benzoate of soda, provided that each container or package of such food is plainly labeled to show the presence and amount of benzoate of soda.

Food Inspection Decisions 76 and 89 are amended accordingly.

THE INFLUENCE OF SODIUM BENZOATE ON THE NUTRITION AND HEALTH OF MAN.

Of the questions referred to this board³ the first to engage our attention have been the following:

(1) "Does a food to which there has been added benzoic acid, or any of its salts, contain any added poisonous or other added deleterious ingredient which may render the said food injurious to health? (a) In large quantities? (b) In small quantities?"

(2) "If benzoic acid or any of its salts be mixed or packed with a food, is the quality or strength of said food thereby reduced, lowered, or injuriously affected? (a) In large quantities? (b) In small quantities?"

To obtain satisfactory answers to these questions the board has felt it necessary to carry through a careful investigation of the effect of benzoic acid or some one of its salts on the nutrition and general health of man. A thorough study of the literature giving the results of work done by various investigators on the physiological effects of benzoic acid and its salts, together with a study of reported clinical and medical observations, therapeutic usage, etc., have made it apparent that additional work was needed to render possible a conclusive answer to the above questions.

With a view to limiting the scope of the work, while at the same time meeting all practical requirements, our investigation, with the consent of the Secretary of Agriculture, has been confined to a study of the effect of the sodium salt of benzoic acid, viz, sodium benzoate.

To make this experimental inquiry as thorough as possible, and to minimize the personal equation, three independent investigations have been carried out—one at the medical school of Northwestern University, in Chicago, under the charge of Prof. John H. Long, of that institution; a second at the private laboratory of Prof. Christian A. Herter, of Columbia University, New York City; and the third at the Sheffield Scientific School of Yale University, in charge of Prof. Russell H. Chittenden.

The same general plan of procedure was followed in all three experiments. A certain number of healthy young men were selected as subjects, and during a

¹ Signed by the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor.

² For other decisions on the use of benzoate of soda in foods, see F. I. D. 76, 89 and 101.

³ Dr. Alonzo E. Taylor, professor in the University of California, a member of this board, owing to absence in Europe, has not been able to participate in the investigations embodied in this report.

period of four months these men, under definite conditions of diet, etc., with and without sodium benzoate, were subjected to thorough clinical and medical observation, while the daily food and the excretions were carefully analyzed, and otherwise studied, and comparison made of the clinical, chemical, bacteriological, and other data collected. (For details, see the individual reports.) In this manner material has been brought together which makes possible conclusions regarding the effect of small and large doses of sodium benzoate upon the human system.

In fixing upon the amount of sodium benzoate that should constitute a "small dose," we have adopted 0.3 gram of the salt per day. Manufacturers of food products, which in their view require the use of a preservative, are in general content with 0.1 per cent of sodium benzoate. This would mean that in the eating of such a preserved food the consumer would need to take 300 grams per day, or nearly two-thirds of a pound of preserved food to ingest an amount of benzoate equal to our minimal daily dosage. Looked at from this point of view, our dosage of 0.3 gram per day seemed a fair amount for a "small dose," one that would clearly suffice to show any effect that small doses of the salt might exert, especially if continued for a considerable length of time. In all these four experiments this daily dosage was continued for a period of about two months. Under "large dose" was included quantities of sodium benzoate ranging from 0.6 gram to 4 grams per day. Such a daily dosage was continued for a period of one month. In a few instances somewhat larger doses were employed.

As the amount and character of the daily diet exert a well-known influence upon many of the metabolic or nutritive changes of the body, as well as upon the bacterial flora of the intestines, attention is called to the fact that the three investigations differed from each other in the amount of protein food consumed daily, thereby introducing a distinctive feature which tends to broaden the conditions under which the experiments were conducted.

The conclusions reached as a result of the individual investigations are given at length in the separate reports herewith presented, together with all of the data upon which these conclusions are based.

The fact should be emphasized that the results obtained from the three separate investigations are in close agreement in all essential features.

The main general conclusions reached by the referee board are as follows:

First.—Sodium benzoate in small doses (under 0.5 gram per day) mixed with the food is without deleterious or poisonous action and is not injurious to health.

Second.—Sodium benzoate in large doses (up to 4 grams per day) mixed with the food has not been found to exert any deleterious effect on the general health, nor to act as a poison in the general acceptance of the term. In some directions there were slight modifications in certain physiological processes, the exact significance of which modifications is not known.

Third.—The admixture of sodium benzoate with food in small or large doses has not been found to injuriously affect or impair the quality or nutritive value of such food.

IRA REMSEN, *Chairman.*
RUSSELL H. CHITTENDEN,
JOHN H. LONG,
CHRISTIAN A. HEETER.

Referee Board of Consulting Scientific Experts.

F. I. D. 105 (Feb. 17, 1909).

THE LABELING OF CANNED SALMON AND WHITE FISH.

Many inquiries have been made of the department regarding the nomenclature commonly employed in designating canned salmon. It is stated that inferior species of salmon are frequently canned and labeled with some name which is understood by the trade to indicate the presence of fish of an inferior variety but which is not so understood by the consumer; as, for instance, "Alaska Salmon." The

department is informed by the Bureau of Fisheries that the species of salmon in the United States are as follows:

1. *Oncorhynchus nerka*. Sockeye or sockeye salmon, blueback salmon, red salmon, redfish, or nerka salmon.
2. *Oncorhynchus tshawytscha*. Chinook salmon, king salmon, quinnat salmon, tye salmon, or spring salmon.
3. *Oncorhynchus gorbuscha*. Humpback salmon, pink salmon, or gorbuscha salmon.
4. *Oncorhynchus kitsutch*. Coho salmon, silver salmon, or medium red.
5. *Oncorhynchus keta*. Calico salmon, keta salmon, dog salmon, or chum salmon.
6. *Salmo gairdneri*. Steelhead salmon, steelhead, hardhead, winter salmon, salmon trout, or square-tailed trout.
7. *Salmo salar*. Atlantic salmon.

Two additional species of landlocked salmon exist in certain New England and Canadian lakes. Neither of these nor the Atlantic salmon is ever canned. Considering this fact, and the further fact that many packers put up humpback and dog salmon under fancy names and thus sell them to consumers who may believe them to be of superior varieties, it is held that canned salmon should be labeled with one of the common names mentioned above as belonging to the species of fish canned.

A similar question has frequently been raised regarding whitefish. A fish designated as *Argyrosomus artedi*, usually called lake herring or cisco, is put on the market at times as "family whitefish." The following is quoted from a communication from the Bureau of Fisheries:

The whitefish tribe in America has numerous representatives, and at least 12 species are regularly caught for market, and others will doubtless in time acquire economic importance. Those now taken are:

Common whitefish of Lake Ontario and Lake Erie, *Coregonus albus*; common whitefish of Lake Huron, Lake Michigan, Lake Superior, Lake of the Woods, Lake Winnipeg, etc., *Coregonus clupeiformis*; Rocky Mountain whitefish, *Coregonus williamsoni*; broad whitefish or Alaska whitefish, *Coregonus kennicotti*; Menominee whitefish or round whitefish, *Coregonus quadrilateralis*; Lake herring, or cisco, *Argyrosomus artedi*; jumbo herring, or Erie cisco, *Argyrosomus eriensis*; Huron cisco or herring *Argyrosomus huronius*; moon-eye, or chub, *Argyrosomus hoyi*; longjaw whitefish, or bloater, *Argyrosomus prognathus*; longjaw, of Lake Superior, *Argyrosomus zenithicus*; blackfin or bluefin whitefish, *Argyrosomus nigripinnis*; tullibee whitefish, *Argyrosomus tullibee*.

To most of these species the name "whitefish," with a qualifying word, is strictly applicable; but there is a wide range in food value, and to permit the sale of most of them as plain "whitefish" would be unjust to the public. The Bureau does not know that this general question has come before your Board, or that you wish to consider it at this time, but sooner or later it will be necessary to render a decision, and at any time it may be brought to your attention because of cases arising in the Washington (D. C.) market, where one of the commonest and best of the fish foods is "smoked whitefish"—consisting of any one of three or four species of *Coregonus* and *Argyrosomus*, none of them *clupeiformis* or *albus*. Under these circumstances it would appear to this Bureau to be proper and feasible to require the different kinds of preserved whitefish to be designated by their qualifying names. The most appropriate name for "family whitefish" is lake herring or cisco; but whitefish as here used would mean, or would be intended to mean, the common whitefish, the best of the tribe.

In harmony with the opinion of the Bureau of Fisheries, the board holds that the term "whitefish" should be applied only to the common whitefishes, *Coregonus albus* and *Coregonus clupeiformis*, unless prefaced by the name of the particular species of whitefish employed. The fishes commonly known to the fishermen and the trade as "lake herring" and "cisco" should be so called, with or without qualifying names, but should not be designated "whitefish."

F. I. D. 106 (Mar. 19, 1909).

AMENDMENT TO FOOD INSPECTION DECISION 77.

(A definition of the terms "Batch" and "Mixtures" as used therein.)

The definition of the term "batch" as given on page 4, lines 12 to 14 of Food Inspection Decision 77, is hereby extended to include also the contents of any one package, cask, or other container holding 500 pounds or less of dye, even though the contents of such package, cask, or container has not undergone the same treatment at the same time and the same place as a unit.

The word "mixtures" as used on page 3, line 15 from the bottom, and following, of Food Inspection Decision 77 is hereby declared to mean not only such mixtures as consist wholly of certified coal-tar dyes but also those which contain one or more certified coal-tar dyes (and no other coal-tar dye or dyes) in combination with other components, constituents, or ingredients not coal-tar dyes, which other components, constituents, or ingredients are in and of themselves or in the combination used harmless and not detrimental to health or are not prohibited for use in food products; the exact formula of such mixtures, including all of the components, constituents, or ingredients, or other parts of the mixture, together with a statement of the total weight of mixture so made, must be deposited with the Secretary of Agriculture and a 1-pound sample thereof must be sent to the Secretary of Agriculture, but such formula need not appear on the label; in lieu of which may appear the legend "Made from certified lots Number----- and Number-----, etc.," and no mention need be made of any constituent or constituents other than of the certified coal-tar dyes employed.

F. I. D. 107 (Apr. 22, 1909).

LEGALITY OF THE APPOINTMENT OF THE REFEREE BOARD.

The decision of the Attorney-General in regard to the legality of the referee board is hereby promulgated as Food Inspection Decision No. 107.

OPINION OF THE ATTORNEY GENERAL.¹

DEPARTMENT OF JUSTICE,

Washington, April 14, 1909.

The honorable The SECRETARY OF AGRICULTURE.

SIR: I am in receipt of your favor of the 23d ultimo, asking my opinion with respect to (1) the legality of the appointment by you of five scientific consulting experts to give you necessary advice upon questions arising in the enforcement of the Food and Drugs Act, June 30, 1906, whose salaries and expenses you have directed to be paid from the appropriation "Laboratory, Department of Agriculture" (34 Stat., 1271); and inquiring specifically (2) whether you were, on February 20, 1908, authorized to form these five consulting experts into a board, and to pay the expenses incident to the investi-

¹ 27 Op. Atty. Gen., 300. See also 27 Op. Atty. Gen., 358, relative to compensation of the referee board.

gations made by such board at your direction, including the compensation of necessary laboratory helpers, the purchase of material, etc., and (3) whether section 9 of the sundry civil act, approved March 4, 1909, or any subsequent legislation has impaired the legal status of the appointments and of the organization of the board, or affected the right of the experts so appointed and organized, to receive compensation for their individual services, or affected your powers to appoint assistants, laboratory helpers, etc., to assist the members of the board, and to incur expenses for necessary material, etc., all to be paid until June 30, 1909, from the appropriation "Laboratory, Bureau of Chemistry, 1909" (35 Stat., 260), and subsequently from the appropriation "General Expenses, Bureau of Chemistry, 1910" (act entitled "An act making appropriations for the Department of Agriculture for the fiscal year ending June thirtieth, nineteen hundred and ten," approved March 4, 1909).

1. As to the legality of the appointment. The Food and Drugs Act, after prohibiting the introduction into any State or Territory, or the District of Columbia, from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of the act, enacts in section 3:

That the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this act, including the collection and examination of specimens of foods and drugs manufactured or offered for sale in the District of Columbia, or in any Territory of the United States, or which shall be offered for sale in unbroken packages in any State other than that in which they shall have been respectively manufactured or produced, or which shall be received from any foreign country, or intended for shipment to any foreign country, or which may be submitted for examination by the chief health, food, or drug officer of any State, Territory, or the District of Columbia, or at any domestic or foreign port through which such product is offered for interstate commerce, or for export or import between the United States and any foreign port or country.

Section 4 enacts:

That the examinations of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of such Bureau, for the purpose of determining from such examinations whether such articles are adulterated or misbranded within the meaning of this Act; and if it shall appear from any such examination that any of such specimens is adulterated or misbranded within the meaning of this act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such sample was obtained. Any party so notified shall be given an opportunity to be heard, under such rules and regulations as may be prescribed as aforesaid, and if it appears that any of the provisions of this act have been violated by such party, then the Secretary of Agriculture shall at once certify the facts to the proper United States district attorney * * *.

The statutes of the United States do not provide for the *creation* of the Bureau of Chemistry in the Department of Agriculture. The *existence* of such bureau is recognized in the appropriation acts, and in the act entitled "An act to make appropriations for the Department of Agriculture for the fiscal year ending June thirtieth, nineteen hundred and eight" (34 Stat., 1271), under the head of "Bureau of Chemistry" appropriations are made for the salaries of "One chemist, who shall be chief of bureau," and a certain number of clerks, laborers, messengers, etc., after which, under the subheading of "Laboratory, Department of Agriculture," a lump sum appropria-

tion was made for "necessary expenses in conducting investigations in this bureau, including * * * work in such investigations, in the city of Washington and elsewhere * * *; for the employment of additional assistants and chemists, when necessary * * *; to investigate the composition, adulteration, and false labeling, or false branding of foods, drugs, beverages, condiments, and ingredients of such articles, when deemed by the Secretary of Agriculture advisable * * *. For all expenses necessary to carry into effect * * * [the Food and Drugs Act] * * * employing such assistants, clerks, and other persons as the Secretary of Agriculture may consider necessary for the purposes named * * *." The act of March 4, 1907 (34 Stat., 1250), passed at the same session with the appropriation act above referred to, expressly authorizes the Secretary of Agriculture—

to make such appointments, promotions, and changes in the salaries, to be paid out of the lump funds of the several bureaus, divisions, and offices of the Department as may be for the best interests of the service: *Provided*, That the maximum salary of any classified scientific investigator in the city of Washington, or other employee engaged in scientific work, shall not exceed three thousand five hundred dollars per annum. And the Secretary of Agriculture is hereby authorized and directed to pay the salary of each employee from the roll of the bureau, independent division, or office in which the employee is working and no other: *Provided, however*, That details may be made from or to the office of the Secretary when necessary and the services of the person whom it is proposed to detail are not required in that office; and he is further authorized and directed to submit to Congress each year a statement covering all appointments, promotions, or other changes made in the salaries paid from lump funds, giving in each case the title, salary, and amount of such change or changes, together with reasons therefor. (34 Stat., 1280.)

Pursuant to the provisions of section 2 of the Food and Drugs Act, the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor, on October 17, 1906, promulgated certain rules and regulations for carrying out the provisions of the act. Regulations 3 and 4 dealt with the collection of samples and the methods of analysis. Regulation 5, "Hearings," is as follows:

(a) When the examination or analysis shows that the provisions of the Food and Drugs Act, June 30, 1906, have been violated, notice of that fact, together with a copy of the findings, shall be furnished to the party or parties from whom the sample was obtained or who executed the guaranty as provided in the Food and Drugs Act, June 30, 1906, and a date shall be fixed at which such party or parties may be heard before the Secretary of Agriculture or such other official connected with the food and drug inspection service as may be commissioned by him for that purpose. The hearings shall be private and confined to questions of fact. The parties interested therein may appear in person or by attorney and may propound proper interrogatories and submit oral or written evidence to show any fault or error in the findings of the analyst or examiner. The Secretary of Agriculture may order a reexamination of the sample or have new samples drawn for further examination.

(b) If the examination or analysis be found correct the Secretary of Agriculture shall give notice to the United States district attorney as prescribed * * *.

The appropriation act of 1908 (35 Stats., 251, 261) made appropriations for the fiscal year ending June 30, 1909, and contained provisions in the lump sum appropriation for "Laboratory, Department of Agriculture" similar to those above quoted from the act of 1907, except that the sentence "for the employment of additional assistants and chemists" was not included in the enumeration of the objects for which the lump sum appropriation was made.

The appropriation act of 1909 (Public No. 330) contains similar provisions to those above cited from the act of 1908. Under these acts, I am clearly of the opinion that the Secretary of Agriculture was empowered to employ in the Bureau of Chemistry such additional assistants and chemists as he should deem necessary to investigate the composition, adulteration, and false labeling, or false branding of foods, drugs, beverages, condiments, and ingredients of such articles, when deemed advisable by him, and such assistants "and other persons" as he might deem necessary to carry into effect the Food and Drugs Act.

The form of appointment which you made, which accompanies your letter, shows that you appointed each of certain persons, "consulting scientific expert to the Secretary of Agriculture, to aid in enforcing the provisions of the" Food and Drugs Act, in the Department of Agriculture at a salary of \$25 per day, for days actually employed, to be paid from the appropriation "Laboratory, Department of Agriculture, General Expenses, Bureau of Chemistry," to perform such duties as should be required by the Secretary. While the form of appointment does not expressly specify that the expert is employed as a part of the Bureau of Chemistry, that fact is implied from the specification of the fund from which he is to be paid. In my opinion these appointments were expressly authorized by the acts of Congress referred to.

2. You further inform me that you organized the five persons so appointed into a board called the "Referee Board," and that you imposed upon them the duty to consider and report to you upon the wholesomeness, or the deleterious character of such foods, or of such articles used in foods as you might refer to them. I do not understand from your communication that you conferred upon this so-called referee board any *power*. Their sole function was to investigate and report to you, and their detail to your office is justified in the provision of the act of March 4, 1907, above quoted. The purposes for the employment of these gentlemen, and the organization of them by you into a board, are set forth in your letter. You point out that it was to enable you to have recourse to the disinterested and unbiased advice of eminent and expert chemists whenever a serious conflict of opinion may arise as to the deleteriousness of any particular article or substance added to food. It is, of course, apparent that in the administration of a statute of such far-reaching effect as the Food and Drugs Act, the ordinary investigation and conclusions of the bureau may be disputed by interested parties, and section 4 of the act provides for a rehearing by the Secretary of Agriculture whenever the conclusion of the bureau is disputed. The Secretary would naturally desire to reach a right conclusion as to such matters and not subject the owners of articles affected by the ruling to litigation if any error should have been committed by the bureau, and Congress would seem to have had that in mind in providing in the lump sum appropriations of 1907 and 1908, for the employment of "such assistants, clerks, and *other persons*, as the Secretary of Agriculture may consider necessary for the purposes named," i. e., the investigation of the composition, adulteration, and false labeling, or false branding of foods, drugs, beverages, etc.,

when deemed by him advisable. Your right to appoint any one of these men for that purpose can scarcely be seriously disputed under the provisions of the act above referred to, and, in my opinion, you were entirely justified in directing them to confer and act as a committee or board in advising you with respect to the enforcement of the act.

3. The act entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred and ten, and for other purposes," approved March 4, 1909 (Public No. 328), contains the following provision:

SECTION 9. That hereafter no part of the public moneys, or of any appropriation heretofore or hereafter made by Congress, shall be used for the payment of compensation or expenses of any commission, council, board, or other similar body, or any members thereof, or for expenses in connection with any work or the results of any work or action of any commission, council, board, or other similar body, unless the creation of the same shall be or shall have been authorized by law; nor shall there be employed by detail, hereafter or heretofore made, or otherwise personal services from any executive department or other government establishment in connection with any such commission, council, board, or other similar body.

You inform me that since this enactment a question has been raised as to your right to cause payments to be made to the above-mentioned experts, and you ask my opinion as to whether or not such objections are well founded. In my opinion this section last quoted does not repeal the provisions of the appropriation act passed at the same session, authorizing the Secretary of Agriculture to employ "such assistants, clerks, and other persons as he may consider necessary" to enable him to carry into effect the provisions of the Food and Drugs Act, nor to submit to a number of persons appointed pursuant to that act, to consider jointly as a committee or board, and report to him for his information, any question upon which he is by law required to take action arising under that act. The commissions or boards referred to in section 9 of the act of March 4, 1909, are commissions or boards constituted without authority of law, and I can not conceive that it could ever be construed to prohibit the head of a department from submitting to the concurrent investigation and report of several employees of his department any question which he might submit for investigation to any one of them. Inasmuch, therefore, as the employment of experts of the character referred to by you is authorized by law, and appropriations made out of which they may be paid for their services, as above set forth, I am of the opinion that neither section 9 of the sundry civil act, approved March 4, 1909, above referred to, nor any other legislation to which my attention has been called, has affected your right to employ such experts or submit to their joint investigation and report, any question of fact affecting the adulteration or misbranding of articles concerning which any party from whom such articles have been obtained is entitled to be given an opportunity to be heard under the provisions of section 4 of the Food and Drugs Act.

Respectfully,

GEO. W. WICKERSHAM,
Attorney General.

F. I. D. 108 (June 15, 1909).

IMPORTATION OF COFFEE.

The department has recently investigated the sale and shipment, within the jurisdiction of the Food and Drugs Act of June 30, 1906, of decomposed, imperfect and damaged coffee. A public hearing on this subject was held by the Board of Food and Drug Inspection on December 15, 1908, at which an opportunity to be heard was given to the trade and to the public.

As a result of the investigation and the evidence adduced at the hearing, it is announced that the product ordinarily known as "Black Jack," consisting of rotten or decomposed berries, is regarded by the department as injurious to health and the Food and Drugs Act forbids its shipment or sale within the jurisdiction of the said act. Coffee which is damaged by water during shipment, or which has acquired a permanently offensive odor because of its proximity to hides or other material of objectionable odor, is considered by the department to come within the phrase "filthy, decomposed, or putrid," within the meaning of that phrase as used in the Food and Drugs Act, and its shipment or sale as hereinbefore stated is, therefore, held to be forbidden. Immature berries, ordinarily known as "Quakers," are dead beans without pronounced smell or taste. They have not the characteristics of coffee, and, in the opinion of the department, their shipment or sale as coffee within the jurisdiction of the act is in violation thereof.

It is recognized that the ordinary coffees of commerce usually contain small quantities of these inhibited products, and no action will be taken in regard to the shipment or sale of the recognized graded coffees of commerce because of the small amount of these substances which may be present. In determining the present action of the department on any particular lot as to whether it contains more than the ordinary small quantities of the inhibited products, coffee graded as No. 8, on the New York Coffee Exchange, will be taken as a standard.

Screenings consisting of inferior or broken berries, of stones, sticks, dirt, etc., should not be sold as coffee even in a ground condition. This product should be designated as "Coffee screenings."

F. I. D. 109 (Aug. 21, 1909).

THE LABELING OF WINES.¹

On June 30, 1909, a hearing was held before the Secretary of Agriculture and the Board of Food and Drug Inspection on the labeling of Ohio and Missouri wines. After giving full consideration to the data submitted, the Board is of the opinion that the term "wine" without modification is an appropriate name solely for the product made from the normal alcoholic fermentation of the juice of sound ripe grapes, without addition or abstraction, either prior or subsequent to fermentation, except as such may occur in the usual cellar treatment for clarifying and aging.² The addition of water or sugar, or both, to

¹ Amended by F. I. D. 156, June 12, 1914. See also F. I. D. 120, 122, and 156.

² See *United States v. Sweet Valley Wine Co.*, p. 625, *post*.

the must prior to fermentation is considered improper, and a product so treated should not be called "wine" without further characterizing it. A fermented beverage prepared from grape must by addition of sugar would properly be called a "sugar wine," or the product may be labeled in such a fashion as to clearly indicate that it is not made from the untreated grape must, but with the addition of sugar. The consumer is, under the Food and Drugs Act, entitled to know the character of the product he buys.

Evidence was offered on the preparation of "wine" from the marc. In these cases it appeared customary to add both water and sugar to the marc and sometimes to use saccharin, coloring matter, preservatives, etc., to make a salable article.

In the opinion of the board no beverage can be made from the marc of grapes which is entitled to be called "wine" however further characterized, unless it be by the word "imitation." The words "Pomace Wine" are not satisfactory, since the product is not a wine in any sense, but only an "imitation wine" and should be so labeled.

F. I. D. 110 (Oct. 14, 1909):

SHELLFISH.¹

The department has investigated the preparation and shipment of oysters, clams, and other shellfish. A public hearing on this subject was held by the Board of Food and Drug Inspection on May 20, 1909. At this hearing, growers, packers, dealers, and the public were afforded an opportunity to be heard.

It is unlawful to ship or to sell in interstate commerce oysters or other shellfish taken from insanitary or polluted beds. The pollution of oysters with sewage can readily be detected by bacteriological examination, and such polluted oysters or other shellfish are adulterated under section 7 of the Food and Drugs Act of June 30, 1906, in that they contain an added "poisonous or other added deleterious ingredient which may render such article injurious to health."

Such articles are likewise adulterated under section 7, in the case of foods because they consist "in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance."

It is unlawful to ship or to sell in interstate commerce oysters or other shellfish which have become polluted because of packing under insanitary conditions or being placed in unclean receptacles. In order to prevent pollution during the packing or shipment of oysters, it is necessary to give proper attention to the sanitary condition of the establishment in which they are packed and to use only receptacles which have been thoroughly cleansed as soon as emptied. In order to prevent the possibility of contamination, it is desirable that such containers be sterilized before using.

It is unlawful to ship or to sell in interstate commerce oysters or other shellfish which have been subjected to "floating" or "drinking" in brackish water, or water containing less salt than that in which they are grown. Such food is adulterated under section 7 of the law because a substance "has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength."

¹ See also F. I. D. 121.

There can be no objection to "drinking" shellfish in unpolluted water of the same salt content as that from which they have been removed. Attention is called, however, to the dangers resulting from "drinking" shellfish near polluted fresh water streams and near other sources of pollution.

It is unlawful to ship or to sell in interstate commerce shucked oysters to which water has been added, either directly or in the form of melted ice. Such food is adulterated under section 7 of the act because a "substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength," and also because a "substance has been substituted wholly or in part for the article."

The packing of shellfish with ice in contact may lead to the absorption by the oyster of a portion of the water formed by the melting ice, thus leading to the adulteration of the oysters with water.

Only unpolluted cold or iced water should be employed in washing shucked shellfish, and the washing, including chilling, should not continue longer than the minimum time necessary for cleaning and chilling.

In view of the fact that the shipping season has begun and shippers will require several months to provide themselves with suitable containers for the shipment of shellfish out of contact with ice, no prosecutions will be recommended prior to May 1, 1910, for the shipment or sale in interstate commerce of oysters or other shellfish because of the addition of water caused solely by shipment in contact with ice.

F. I. D. 111 (Jan. 7, 1910.)

THE LABELING OF YEAST.

On August 3, 1909, a hearing was held before the Board of Food and Drug Inspection on the application of the Food and Drugs Act of June 30, 1906, to the sale in interstate commerce of compressed yeast. Other investigations along the same line have been made by the department, and as a result of the hearing and of these investigations the position of the department is:

1. That the term "compressed yeast," without qualification, means distillers' yeast without admixture of starch.
2. That if starch and distillers' yeast be mixed and compressed such product is misbranded if labeled or sold simply under the name "compressed yeast." Such a mixture or compound should be labeled "compressed yeast and starch."
3. That it is unlawful to sell decomposed yeast under any label.

F. I. D. 112 (Jan. 6, 1910).¹

AMENDMENT TO REGULATION 28, LABELING OF DERIVATIVES.

[See regulation 28, p. 26, *ante*.]

¹Approved by the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor.

F. I. D. 113 (Feb. 16, 1910).¹**THE LABELING OF WHISKY, MIXTURES, AND IMITATIONS THEREOF, UNDER THE FOOD AND DRUGS ACT OF JUNE 30, 1906.²**

Under the Food and Drugs Act of June 30, 1906, all unmixed distilled spirits from grain, colored and flavored with harmless color and flavor, in the customary ways, either by the charred barrel process, or by the addition of caramel and harmless flavor, if of potable strength and not less than 80° proof, are entitled to the name whisky without qualification. If the proof be less than 80°, i. e., if more water be added, the actual proof must be stated upon the label and this requirement applies as well to blends and compounds of whisky.

Whiskies of the same or different kinds, i. e., straight whisky, rectified whisky, redistilled whisky and neutral spirits whisky are like substances; and mixtures of such whiskies, with or without harmless color or flavor used for purposes of coloring and flavoring only, are blends under the law and must be so labeled. In labeling blends the act requires two things to be stated upon the label to bring the blended product within the exception provided by the statute: First, the blend must be labeled, branded or tagged so as to plainly indicate that it is a blend, in other words that it is composed of two or more like substances, which in the case of whisky must each be of itself a whisky, and second, the word "blend" must be plainly stated upon the package in which the mixture is offered for sale. A mixture of whiskies therefore, with or without harmless coloring or flavoring, used for coloring and flavoring only, is correctly labeled "Kerwan Whisky. A Blend of Whiskies."

Since the term whisky is restricted to distillates from grain, and distillates from other sources are unlike substances to distillates from grain, such distillates from other sources without admixture with grain distillates are misbranded if labeled whisky without qualification, or as a blend of whiskies. However, mixtures of whisky, with a potable alcoholic distillate from sources other than grain, such as cane, fruit or vegetables, are not misbranded if labeled compound whisky, provided the following requirements of the law are complied with: First, that the product shall be labeled, branded or tagged so as to plainly indicate that it is a compound, i. e., not a mixture of like substances, in this case whiskies; and, second, that the word "Compound" is plainly stated upon the package in which the mixture is offered for sale. For example, a mixture of whisky, in quantity sufficient to dominate the character of the mixture, with a potable alcoholic distillate from sources other than grain and including harmless color and flavor is correctly labeled "Kerwan Whisky. A compound of whisky and cane distillate." Unmixed potable alcoholic distillates from sources other than grain, with or without harmless color or flavor, are not misbranded if labeled "Imitation Whisky."

¹ Signed by the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor.

² See F. I. D. 45, 65, 95, 98, 118, and 127 on the labeling of whiskies; also opinions of the Attorneys General, pp. 775, 783, 797, *post*; Report of the Solicitor General, p. 818, *post*; and Decision of the President, p. 831, *post*, on the same subject.

When an essence or oil is added to a distillate of grain, which without such addition is entitled to the name whisky, and the effect of such addition is to produce a product which simulates a whisky of another kind different from the kind of whisky to which the essence is added, the mixture is an imitation of the particular kind of whisky which is simulated, e. g., if rye essence be added to a highly rectified distillate of corn, the mixture is misbranded if labeled rye whisky. Such a mixture is not misbranded if labeled "Whisky—Imitation Rye."

Nothing in the Food and Drugs Act inhibits any truthful statement upon the label of any product subject to its terms, such as the particular kind or kinds of whisky, vended as whisky or as blends or compounds thereof, but when descriptive matter, qualifying the name whisky, is placed upon the label, it must be strictly true, and not misleading in any particular. The law makes no allowance for seller's praise upon the label, if false or misleading, and the product is misbranded if a false or misleading statement be made upon one part of the label and the truth about the product be stated upon another part. Similarly a product is misbranded if the label is false or misleading through the use of a trade-marked statement, design or device. The fact that a phrase, design or device is registered in the United States Patent Office gives no license for its deceptive use. All descriptive matter qualifying or particularizing the kind of whisky, whether volunteered or required by the law to be stated, as in the case of blends and compounds, must be given due prominence as compared with the size of type and the background in which the name whisky appears, so that the label as a whole shall not be misleading in any particular.

Food Inspection Decisions 45, 65, 95 and 98, and all rulings in conflict herewith, are hereby revoked.

F. I. D. 114 (Feb. 16, 1910).

THE LABELING OF "CARACAS COCOA."

The Board of Food and Drug Inspection has had under consideration for some time the question of the propriety of the use of the term "Caracas" as applied to cocoa coming from South America. Valuable information has been obtained through the Department of State in the form of a dispatch from the American consul at La Guaira, Venezuela, under date of September 30, 1909. In reply to a request from the Secretary of State for a report on the cocoa of Venezuela and its proper designation, the American consul states as follows:

In reply thereto I am informed that the term "Caracas cocoa" or "Caracas cacao" should properly, according to its original usage, be applied only to cacaos exported through the port of La Guaira, but through the extension of the industry and similarity of product it has become corrupted so as to cover all "current" or "ordinary" cacaos of Venezuela, including those coming from Río Chico, Río Caribe, Guiría, Carupano, and Higuerote. This has come about because of the parallel quality of these cacaos with those of the so-called "Caracas" district.

There are three Venezuelan districts usually found in current quotations of cacaos: Angostura, being the cacaos coming out of the lower Orinoco basin through Ciudad Bolívar; Caracas, those mentioned above; Maracaibo, those

cacaos being exported through Maracaibo. Exports from La Guaira and Puerto Cabello, with the exception of perhaps 10,000 bags (mentioned below), cover only such cacaos as are generally known as "current," and therefore classified by importers in the United States as "Caracas."

There are some small districts lying between La Guairo and Puerto Cabello, known as Choroni, Ocumare, Cepe, and Chuao, turning out about 10,000 bags annually of a very high grade of cocoa, but this virtually all goes to Europe, principally to Paris, and is therefore not quoted in the ordinary "brokers" cocoa reports.

* * * * *

The cacaos from Carupano, Rio Caribe, and Higuerote are said to be of the same grade as these two latter. The Angosturas may be more or less a cent better in grade than the samples of "Caracas" sent herewith.

* * * * *

From what I can learn of the cacao situation I think the name "Caracas" has gotten to be more of a designation of the current class of Venezuelan cacao than to indicate the district of its production, and under the circumstances it seems the term has taken on the broader meaning suggested in the letter of the Secretary of Agriculture of August 30, 1909. To further indicate that this is true I beg to inclose a "Broker's cocoa report," from a New York commission house, wherein no other Venezuelan districts are named than Angostura, Caracas, and Maracaibo.

In House Documents, volume 65, serial 4844, Fifty-eighth Congress, page 155, is the following:

The cacao of Venezuela also finds a ready sale in the United States, in the markets of which it is known, like coffee, by the name of "Caracas" and "Maracaibo," the former embracing the cacao coming from Rio Caribe, Guiria, Carupano, Rio Chico, Higuerote, and other places on the eastern coast; the other grade comes from the States of Zulia, Merida, Trujillo, and Tachira.

This corresponds entirely with the views expressed by our consul at La Guaira.

After a consideration of this question, the Board is of the opinion that the term "Caracas" is properly applied to the area mentioned in the above quotation from House Documents, volume 65.

F. I. D. 115 (Feb. 23, 1910).

ON THE USE OF GEOGRAPHICAL NAMES.

Regulation 19 of Circular 21, under captions (b) and (c) contains the following:

(b) The use of a geographical name shall not be permitted in connection with a food or drug product not manufactured or produced in that place, when such name indicates that the article was manufactured or produced in that place.

(c) The use of a geographical name in connection with a food or drug product will not be deemed a misbranding when by reason of long usage it has come to represent a generic term and is used to indicate a style, type, or brand; but in all such cases the State or Territory where any such article is manufactured or produced shall be stated upon the principal label.

There are many cases which have been considered by the Board of Food and Drug Inspection in which it has been necessary to decide whether or not, in its opinion, certain geographical names have been sufficiently generic to indicate a style, type, or brand, and in consequence might be used without offending any of the provisions of the Food and Drugs Act. Among the geographical names which have been under consideration are "Rocky Ford" as applied to cantaloupes, and "Indian River" as applied to oranges.

The Rocky Ford melon is not a new variety of melon, but is one of the older varieties of melons which in the environment of Rocky Ford, Colo., has attained particular excellence.

The same remark applies to the Indian River oranges of Florida. They are not a new variety, but various varieties which in the environment of the Indian River have attained unusual excellence.

The board holds that the terms "Rocky Ford" and "Indian River" have not become sufficiently generic to indicate styles, types, or brands of melons and oranges, respectively, but that these geographical names are only properly applied to the product of the restricted area for the melons which are grown in or near Rocky Ford, and for the product grown in or near the Indian River. Inasmuch as the term "Rocky Ford" has thus become associated with a melon of peculiar excellence of a certain geographical locality, the board holds that it is unlawful to sell in interstate commerce melons not grown in the Rocky Ford district as "Rocky Ford Seed" melons. The terms are nearly alike, the intent is to deceive, and the law provides that a label should not be false or deceptive in any particular.

F. I. D. 116 (Apr. 12, 1910).

AMENDMENT TO FOOD INSPECTION DECISION 74.

In Food Inspection Decision 74, it is provided that—

Stearin, for mixture with domestic oils, not animal, may be admitted without certificate if the importer executes a penal bond conditioned upon the subsequent export of all stearin thus imported.

This provision is revoked, and hereafter stearin will not be admitted into the United States unless accompanied by a certificate, in the form prescribed in Food Inspection Decision 74, showing its freedom from disease, as in the case of meats and other meat food products of cattle, sheep, swine, and goats.

F. I. D. 117* (Apr. 7, 1910).

THE USE OF CERTIFIED COLORS.¹

Food Inspection Decision No. 76, published July 13, 1907, gives a list of seven coal-tar dyes, which may, without objection from the Department of Agriculture, be used in foods until further notice. Food Inspection Decision No. 77, published September 25, 1907, provides for the certification of dyes. Food Inspection Decision No. 77 was amended March 25, 1909, by Food Inspection Decision No. 106. Some manufacturers have succeeded in producing the seven colors, under the conditions outlined in Food Inspection Decision No. 77. Certified dyes are now on the market. Certified dyes may be used in foods without objection by the Department of Agriculture, provided the use of the dye in food does not conceal damage or inferiority. If damage or inferiority be concealed by the use of the dye, the food is adulterated.

¹ See also F. I. D. 51, 76, 77, 92, 102, 106, 129, 148, and 149 relative to use of colors in foods.

Uncertified coal-tar dyes are likely to contain arsenic and other poisonous material, which, when used in food, may render such food injurious to health and, therefore, adulterated under the law.

In all cases where foods subject to the provisions of the Food and Drugs Act of June 30, 1906, are found colored with dyes which contain either arsenic or other poisonous or deleterious ingredient which may render such foods injurious to health, the cases will be reported to the Department of Justice and prosecutions had.

The department is in possession of facts which show that there are so-called vegetable colors on the market which contain excessive quantities of arsenic, heavy metals and contaminations due to imperfect or incomplete manufacture. While the department has raised no objection to the use of vegetable colors, per se, yet the use of colors even of vegetable origin, open to the objection of excessive arsenic, etc., should not be used for coloring food products.

F. I. D. 118 (Apr. 18, 1910).¹

LABELING OF WHISKEY COMPOUNDS UNDER F. I. D. 113.²

At the instance of certain parties in interest we have considered the suggestion for a modification of the rules embodied in Food Inspection Decision No. 113. The suggestion was that mixtures of whiskey with a potable alcohol distillate from sources other than grain, such as cane, fruit, or vegetables, are not misbranded if labeled "a blend of whiskey and neutral spirit." After exhaustive consideration we have concluded that such a change would be in conflict with the controlling reason of the rule itself.

It has also been suggested that the term "blend" might be employed under the circumstances given if the neutral spirit disclosed its origin by the designation "neutral molasses spirit," or other like terms. While a modification in that form might protect the public against deception or misunderstanding, we are nevertheless of the opinion that such a modification would still be in conflict with the fundamental principle adopted in the President's opinion and in Food Inspection Decision No. 113. In our opinion such a combination, if it is to be designated according to the terms of the law, would be a compound, and not a blend, and if either term is to be employed the former is the only one that is permissible.

Our conclusion accordingly is that we must decline to modify the decision heretofore adopted in any respect.

F. I. D. 119 (May 6, 1910).

USE OF SHELLAC AND OTHER GUMS FOR COATING CHOCOLATES AND OTHER CONFECTIONS.

The Board of Food and Drug Inspection has carefully considered the evidence which has been presented at various times respecting the practice of coating chocolates and other confections with shellac and other gums.

¹ Signed by the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor.

² See F. I. D. 45, 65, 95, 98, 113 and 127 relative to the labeling of whiskies; also opinions of the Attorneys General, pp. 775, 783, 797, *post*; Report of the Solicitor General, p. 818, *post*; and Decision of the President, p. 831, *post*, on the same subject.

The board is of the opinion that it is not a proper proceeding under the provisions of the Food and Drugs Act. It is evident that such coating will not only conceal inferiority, but it appears further that as a rule the gums are dissolved in alcohol. One man in giving evidence before the board stated that in his opinion there was no objection to wood alcohol as a solvent. In dipping confections into an alcoholic solution of a gum a certain quantity of the alcohol must necessarily permeate the product. Evidence is adduced showing that the product is not submitted to any subsequent process of heating whereby the traces of alcohol could be removed. Although only mere traces of alcohol may remain, the addition of these substances, and especially of wood alcohol, to a confection is specifically prohibited by the act. Evidence is also in the possession of the board to show that a large number of the manufacturers either never have employed this method or have discontinued it, and that goods can be, and are, made and sold in all quantities with no difficulty without the use of shellac or other gums. Evidence further shows that one of the reasons for adding the coating is that the goods may be held for a longer time. The exposure of confections for a long while before use is not advisable nor desirable.

F. I. D. 120 (May 13, 1910).¹

LABELING OF OHIO AND MISSOURI WINES.²

The question has arisen whether fermented beverages made in the States of Ohio and Missouri by the addition of a solution of sugar and water to the natural juice of grapes before fermentation may be labeled, under the Food and Drugs Act, as "Ohio Wine," or "Missouri Wine," respectively, without further qualification. In Food Inspection Decision 109 it was announced that the term "wine" without qualification is properly applied only to the product made from the normal alcoholic fermentation of the juice of sound, ripe grapes without addition or abstraction, except such as may occur in the usual cellar treatment for clarifying and aging.

It has been decided after a careful review that the previous announcement is correct and that the term "wine" without further characterization must be restricted to products made from untreated must without other addition or abstraction than that which may occur in the usual cellar treatment for clarifying and aging. However, it has been found that it is impracticable, on account of natural conditions of soil and climate, to produce a merchantable wine in the States of Ohio and Missouri without the addition of a sugar solution to the grape must before fermentation. This condition has recognition in the laws of the State of Ohio, by which wine is defined to mean the fermented juice of undried grapes, and it is provided that the addition, within certain limits, of pure white or crystallized sugar to perfect the wine or the use of the necessary things to clarify and refine the wine, which are not injurious to health, shall not be construed as adulterations and that the resultant product may be sold under the name "wine." Furthermore, it is permitted in some

¹ Signed by the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor.

² See also F. I. D. 109, 122, and 156 on the labeling of wines.

of the leading wine-producing countries of Europe to add sugar to the grape juice and wine, under restrictions, to remedy the natural deficiency in sugar or alcohol, or an excess of acidity, to such an extent as to make the quality correspond to that of wine produced, without any admixture, from grapes of the same kind and vintage in good years. It is conceived that there is no difference in principle in the adding of sugar to must in poor years to improve the quality of the wine than in the adding of sugar to the must every year for the same purpose in localities where the grapes are always deficient.

In view of this practice, and having regard to the fact that fermented beverages have been produced in the States of Ohio and Missouri by the addition of a sugar solution to grape must before fermentation and sold and labeled as "Ohio Wine" and "Missouri Wine," respectively, for a period of over 60 years, it is held a compliance with the terms of Food Inspection Decision 109 if the product made from Ohio and Missouri grapes by complete fermentation of the must under proper cellar treatment, and corrected by the addition of a sugar solution to the must before fermentation so that the resultant product does not contain less than five parts per thousand acid and not more than 13 per cent of alcohol after complete fermentation, are labeled as "Ohio Wine" or "Missouri Wine" as the case may be, qualified by the name of the particular kind or type to which it belongs.

An Ohio or Missouri dry still wine made as above stated and sweetened with a sugar solution which does not increase the volume of the wine more than 10 per cent, and fortified with tax-paid spirits, may be labeled as "Ohio Sweet Wine" or "Missouri Sweet Wine" as the case may be, qualified by the name of the particular kind or type to which it belongs.

The product made in Ohio and Missouri by the addition of water and sugar to the pomace of grapes from which the juice has been partially expressed, and by fermenting the mixture until a fermented beverage is produced, may be labeled as "Ohio Pomace Wine" or "Missouri Pomace Wine" as the case may be. If a sugar solution be added to such products for the purpose of sweetening after fermentation they should be characterized as "Sweet Pomace Wines." The addition to such products of any artificial coloring matter or sweetening or preservative other than sugar must be declared plainly on the label to render such products free from exception under the Food and Drugs Act.

F. I. D. 121 (May 14, 1910).

THE FLOATING OF SHELLFISH.¹

Considerable evidence has been submitted to the department since the issuance of Food Inspection Decision 110 on the practice of floating or drinking oysters in water of less saline content than that in which they were grown to maturity.

Full consideration has been given to all the hearings and to the briefs and other information submitted subsequent to the hearings and the board is of the opinion that it is not improper to drink oysters in water of a saline content equal to that in which oysters

¹ Amendment to F. I. D. 110.

will grow to maturity. If, however, oysters are floated in water of a less saline content than that in which oysters will properly mature, the packages containing such oysters must be very clearly and legibly labeled "Floated Oysters," otherwise they will be considered adulterated under section 7 of the law.

Particular attention should be paid by the growers and handlers of oysters to the character of the water in which the oysters are brought to maturity or floated. Where such waters are polluted it will invariably follow that the oysters will also partake of this pollution and subsequent washing of the oysters, or even floating in water which is not polluted is likely not to cleanse them of this pollution.

Oysters found in interstate commerce in a polluted condition because of the character of the water in which they are grown or floated are adulterated under the Food and Drugs Act.

F. I. D. 122 (May 31, 1910).

THE LABELING OF PORT AND SHERRY WINES PRODUCED IN THE UNITED STATES.¹

A hearing was held on March 21, 1910, before the Secretary of Agriculture and the Board of Food and Drug Inspection on the labeling of wines produced in California, which for many years have been known as "California Port" and "California Sherry," respectively.

It is the view of the department that the terms "Port" and "Sherry" without qualification are properly applied only to the products from Portugal and Spain, respectively, but it is held that domestic ports and sherries are not misbranded if the terms "Port" or "Sherry," as the case may be, are qualified by the name of the State where the wine is produced.

F. I. D. 123 (June 16, 1910).

LABELING OF RICES.²

Inquiries have been received as to what is the proper branding under the Food and Drugs Act of certain varieties of rice which have come to be known under geographic names. It is well known among the trade that there are current in commerce in the United States varieties of rice grown in Japan and varieties of rice grown within the United States from seed originating in Japan, which are marked and sold as "Japan Rice" irrespective of origin, and that a variety of rice grown in Mexico is imported as "Honduras Rice." The names "Japan Rice" and "Honduras Rice," used without qualification, in the opinion of the board, clearly convey the impression to consumers that the rices are grown in Japan and Honduras, respectively, and if applied to rices not there grown, constitute misbranding within the meaning of section 8 of the Food and Drugs Act, which provides—

That the term "misbranded" as used herein shall apply * * * to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

¹ See also F. I. D. 109, 120, and 156, on the labeling of wines.

² See F. I. D. 67 on the polishing and coating of rice.

The labeling of rices which have come to be known under geographical names, and which are not grown in the State or country which the names indicate, is covered by regulation 19, paragraph (c), reading as follows:

The use of a geographical name in connection with a food or drug product will not be deemed a misbranding when by reason of long usage it has come to represent a generic term and is used to indicate a style, type, or brand; but in all such cases the State or Territory where any such article is manufactured or produced shall be stated upon the principal label.

To meet the requirements of this regulation rices grown within the United States, labeled "Japan Rice," should have also plainly stated on the label "Grown in the United States;" rices grown in Mexico or Louisiana, for example, labeled "Honduras Rice," should have also stated plainly on the label "Grown in Mexico," or "Grown in Louisiana," as the case may be.

There are also on the market varieties of rice labeled "Carolina White" and "Carolina Gold," which are grown in North and South Carolina, and also in any other States from Carolina seed. The board is of the opinion that the names "Carolina White" and "Carolina Gold" by long usage have come to mean particular varieties of rice rather than rice grown in North or South Carolina, and such rices will not be held to be misbranded if plainly labeled "Carolina White" or "Carolina Gold," as the case may be, whether qualified or not, as growers or packers may see fit, by a statement of the name of the locality where the rice is actually grown. On the other hand, if it is desired to designate rices grown from Carolina seed in States other than North and South Carolina as "Carolina Rice," there should also be plainly stated on the label the name of the locality where the rice is actually grown, as, for example, "Carolina Rice, Grown in Arkansas."

F. I. D. 124 (June 28, 1910).

LABELING OF STOCK FEED.¹

It has been brought to the attention of the Board of Food and Drug Inspection that considerable uncertainty exists in the minds of manufacturers of stock feed as to what ingredients are included within the terms "nitrogen-free extract," "carbohydrates," and "sugar and starch." Confusion in this particular results in part from the varied interpretation given to the feeding stuff laws of different States. Each of the terms has a definite significance. The term "nitrogen-free extract" includes starch, sucrose, reducing sugars, pentosans, organic acids, coloring matter, and certain other ingredients in small quantities, and the amount of nitrogen-free extract present in a stock feed is determined by subtracting the sum of the moisture, crude fiber, protein, fat, and ash content from 100 per cent. Stock feed will not be held to be misbranded on account of statements on labels of the "nitrogen-free extract" content if analysis shows that the amount obtained by this method is correctly declared.

The term "carbohydrates" includes most of the specified ingredients which make up the nitrogen-free extract, plus crude fiber, but

¹ See also F. I. D. 90 on the labeling of stock and poultry feeds.

does not include organic acids and coloring matter. The amount of ingredients included in nitrogen-free extract which are not carbohydrates is so small in stock feeds that they may be disregarded in stating the amount of carbohydrates, and stock feeds will not be held to be misbranded on account of statements on labels of the proportion of carbohydrates if analysis shows that the percentage of carbohydrates declared equals the percentage of nitrogen-free extract obtained as indicated, plus the percentage of crude fiber.

Sugar and starch are carbohydrates and are included in determining the amount of carbohydrates present in stock feed. The term "starch and sugar," however, is properly applied only to the actual starch, sucrose, and reducing sugars contained therein, and stock feed will not be held to be misbranded on account of statements on labels of the percentage of starch and sugar, as such, if the percentage stated is the correct percentage of the amount of the starch, sucrose, and reducing sugars actually present.

This decision will go into effect January 1, 1911.

F. I. D. 125 (July 7, 1910).

THE LABELING OF CORDIALS.

The term "cordial" is usually applied to a product, the alcohol content of which is some type of a distilled spirit, commonly neutral spirits or brandy. To this is added sugar and some type of flavor. The flavor is sometimes derived directly by the addition of essential oils, again by use of synthetic flavors, and also by the treatment of some vegetable product with the alcoholic spirit to extract the flavoring ingredients. It is likewise the general custom to color cordials. When a cordial is colored in such a way as to simulate the color of the fruit, flavor, plant, etc., the name of which it bears, the legend "Artificially Colored" in appropriate size type shall appear immediately beneath the name of the cordial, as is required by regulation 17. Where the color used is not one which simulates the color of a natural product, the name of which is borne by the liqueur, then the legend as to the presence of artificial color need not be used. For example, crème de menthe which is artificially colored green should be labeled "Artificially Colored." On the contrary, chartreuse, either green or yellow, need bear no such legend for color.

When the flavoring material is not derived in whole directly from a flower, fruit, plant, etc., the name of any such flower, fruit, plant, etc., should not be given to any cordial or liqueur unless the name is preceded by the word "Imitation."

The term cordial carries with it the significance of sugar (sucrose) as the sweetening agent. When anhydrous sugar (dextrose) is used, the label should bear a statement substantially as follows: "Prepared with anhydrous sugar," which statement should be made in a distinct fashion on the main label.

F. I. D. 126 (Sept. 22, 1910).

SALTS OF TIN IN FOOD.¹

The attention of the board has been directed to canned goods which contain salts of tin derived from the solvent action of the contents of the package upon the tin coating. Pending further investigations on this question all canned goods which are prepared prior to January 1, 1911, will be permitted to enter and pass into interstate commerce without detention or restriction in so far as their content of tin salts is concerned. All foods which are canned subsequently to January 1, 1911, will be permitted importation and interstate commerce if they do not contain more than 300 milligrams of tin per kilogram, or salts of tin equivalent thereto. When the amount of tin, or an equivalent amount of salts of tin, is greater than 300 milligrams per kilogram, entry of such canned goods packed subsequently to January 1, 1911, will be refused, and if found in interstate commerce proper action will be taken.

It is the opinion of the board that the trade will experience little hardship in adjusting itself to this condition, as the results of examinations made by the Bureau of Chemistry of various types of canned goods indicate that in a very large majority of cases inconsiderable quantities of tin are found, well within the limit herein set.

F. I. D. 127 (Oct. 26, 1910).²

DECISION OF THE ATTORNEY-GENERAL IN REGARD TO THE LABELING OF WHISKIES SOLD UNDER DISTINCTIVE NAMES.

The following decision of the Attorney-General in regard to the labeling of whisky is hereby promulgated as Food Inspection Decision No. 127:

OPINION OF THE ATTORNEY GENERAL.³

DEPARTMENT OF JUSTICE,
Washington, October 19, 1910.

The honorable the SECRETARY OF AGRICULTURE.

SIR: I have received your letter of July 28, 1910, in which you submit to me the following question of law for my opinion:

Is "Canadian Club whisky" such a distinctive name, under the provisions of section 8, paragraphs 10 and 11. of the food and drugs act of June 30, 1906 (34 Stat., 768), as to relieve a mixture of two separate and distinct distillates of grain from the requirement of being labeled "A blend of whiskies," under section 8, paragraph 12, of the same act?

Your letter informs me that—

"Canadian Club whisky" is a mixture of grain distillates, duly aged after mixing, without further admixture, and reaches the consumer at 90° proof. It is a particular kind and brand of whiskies made by Hiram Walker & Sons (Limited), at Walkerville, Ontario, and is now and has been for years known

¹ See *United States v. 2,000 Cases of Canned Tomatoes*, p. 382, *post*.

² See F. I. D. 45, 65, 95, 98, 113, and 118 on the labeling of whiskies; also opinions of the Attorneys General, pp. 775, 783, 797, *post*; Report of the Solicitor General, p. 818, *post*; and Decision of the President, p. 831, *post*, on the same subject.

³ 28 Op. Atty. Gen., 455.

and sold under the name "Canadian Club whisky." It is known by that name and no other to the trade and consumers in the United States and other countries, and no other whisky is known by that name. "The Department of Agriculture," you advise me, "claims that the product is required to be labeled 'a blend of whiskies,' under the law as interpreted in Food Inspection Decision 113. The distillers contend that 'Canadian Club whisky,' under section 8 of the food and drugs act, is such a distinctive name as is there described, and therefore that the product is not required to be labeled as a blend."

By arrangement between your department and Messrs. Hiram Walker & Sons (Limited) briefs were submitted to me by the solicitor of your department and the counsel of Messrs. Hiram Walker & Sons, respectively, in support of their respective contentions; and I have also had the assistance of oral argument by such solicitor and counsel.

By executive order dated April 8, 1909, the President referred to the Solicitor General of the United States certain questions, including, among others:

I. What was the article called whisky as known (1) to the manufacturers, (2) to the trade, and (3) to the consumers at and prior to the date of the passage of the pure-food law?

II. What did the term whisky include?

The Solicitor General took a voluminous amount of testimony and heard the arguments of parties appearing before him, and reported to the President on May 24, 1909, among other things, that—

(1) The article called whisky as known to the manufacturers at and prior to the date of the passage of the pure-food law was—

(a) What is often spoken of as "straight whisky," made from grain.

(b) Also what is often spoken of as "rectified whisky," made from grain, when not a mere neutral spirit, as described in section (d) below, of the answers to this question I.

(c) Also a mixture of straight whiskies, or of rectified whiskies, or of straight whisky and rectified whisky, or of straight whisky and what is often known as neutral spirit (made from grain), or of rectified whisky and such neutral spirit (made from grain), or of straight whisky, rectified whisky, and such neutral spirit (made from grain), if in the particular case the mixture satisfied the description of whisky given below in answer to question II (Proceedings, etc., p. 1245). * * *

The article called whisky as known to the consumers * * * was—

(a) What is often spoken of as "straight whisky," made from grain.

(b) Also what is often spoken of as "rectified whisky" if conforming to the description of whisky given below in answer to question II.

(c) Also a mixture of straight whiskies, or of rectified whiskies, or of straight whisky and rectified whisky, or of straight whisky and what is known as neutral spirit (made from grain), or of rectified whisky and such neutral spirit (made from grain), or of straight whisky, rectified whisky, and such neutral spirit (made from grain), if in the particular case the mixture satisfied the description of whisky given below in answer to Question II.

In answer to the question, "What did the term 'whisky' include?" he reported as follows:

The term "whisky" included, both at and prior to the date of the passage of the pure-food law, and has since included, the spirituous liquor composed of (1) alcohol derived by distillation from grain; (2) a substantial amount of by-products (often spoken of as congeners), likewise derived by distillation from grain, and giving a distinctive flavor and properties; (3) water sufficient without unreasonable dilution to make the article potable; and (4) in some cases—though such addition is not essential—harmless coloring or flavoring matter, or both, in amount not materially affecting other qualities of whisky than its color or flavor.

A mixture of two or more articles, being each a whisky within the foregoing description, was at and prior to the date of passage of the pure-food law, and has since been, whisky. A mixture of one or more whiskies, being each whisky within the foregoing description, with alcohol or a neutral spirit—being an article different from whisky through lack of a substantial amount of by-products derived by distillation from grain and giving distinctive flavor and properties—is whisky if the alcohol or neutral spirit is derived by distillation from grain and if the mixture still conforms to the above general description of whisky; and so it was at and prior to the date of passage of the pure-food law. (Proceedings, etc., p. 1246.)

Upon exceptions to this report the decision of the Solicitor General was reviewed by the President, who differed with him only in that he thought the Solicitor General had fallen into the error of—

making too nice a distinction in reference to the amount of congeneric substances or traces of fusel oil required to constitute whisky for practical purposes, when the flavor and color of all whiskies but straight whiskies have been chiefly that of ethyl alcohol and burnt sugar.

And the President held:

After an examination of all the evidence it seems to me overwhelmingly established that for a hundred years the term "whisky" in the trade and among the customers has included all potable liquor distilled from grain; that the straight whisky is, as compared with the whisky made by rectification or redistillation and flavoring and coloring matter, a subsequent improvement, and that therefore it is a perversion of the pure-food act to attempt now to limit the meaning of the term "whisky" to that which modern manufacture and taste have made the most desirable variety.

It is undoubtedly true that the liquor trade has been disgracefully full of frauds upon the public by false labels, but these frauds did not consist in palming off something which was not whisky as whisky, but in palming off one kind of whisky as another and better kind of whisky. Whisky made of rectified or redistilled or neutral spirits and given a color and flavor by burnt sugar, made in a few days, was often branded as Bourbon or rye straight whisky. The way to remedy this evil is not to attempt to change the meaning and scope of the term "whisky," accorded to it for one hundred years, and narrow it to include only straight whisky; and there is nothing in the pure-food law that warrants the inference of such an intention by Congress.

Following the decision of the President, the Secretaries of the Treasury, Agriculture, and Commerce and Labor prepared and promulgated a regulation under the Food and Drugs Act known as "Food Inspection Decision No. 113," the portions of which material to this opinion are as follows:

Under the Food and Drugs Act of June 30, 1906, all unmixed distilled spirits from grain, colored and flavored with harmless color and flavor, in the customary ways, either by the charred barrel process or by the addition of caramel and harmless flavor, if of potable strength and not less than 80° proof, are entitled to the name whisky without qualification. * * *

Whiskies of the same or different kinds, i. e., straight whisky, rectified whisky, redistilled whisky, and neutral spirits whisky are like substances; and mixtures of such whiskies, with or without harmless color or flavor used for purposes of coloring and flavoring only, are blends under the law and must be so labeled.

This ruling would require "Canadian Club whisky" to be sold under a label stating it to be "A Blend of Whiskies," unless, as claimed by the manufacturers, "Canadian Club whisky" is its own distinctive name, within the meaning of section 8 of the pure-food law.

That section prohibits the misbranding of all articles of food (which include drink), and specifies that the term "misbranded" shall apply to all articles the package or label of which shall bear

any statement, design, or device regarding the article or ingredients contained therein which shall be false or misleading in any particular; that the article shall also be deemed misbranded—

If it be labeled or branded so as to deceive or mislead the purchaser. * * *

If the package containing it, or its label, shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article. * * *

Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word "compound," "imitation," or "blend," as the case may be, is plainly stated on the package in which it is offered for sale. * * *

It is conceded that the requirements in paragraphs first and second, above cited, are alternative, and that a mixture or compound which may be sold under its own distinctive name, pursuant to the provisions of the first paragraph, need not be marked as a "compound," "imitation," or "blend" under the provisions of the second paragraph. Canadian Club whisky is, you say, entirely "a mixture of grain distillates, duly aged after mixing, without further admixture * * *." It is, therefore, a mixture of two whiskies, as under the President's decision the term "whisky" in the trade and among customers includes all potable liquor distilled from grain. Being a mixture of whiskies it is distinguished from all other whiskies by the name "Canadian Club."

Regulation 20 of the "Rules and Regulations for the enforcement of the Food and Drugs Act," promulgated by the three Secretaries under date of October 17, 1906, and published as Circular No. 21 of the office of the Secretary of Agriculture, reads as follows:

(a) A "distinctive name" is a trade, arbitrary, or fancy name which clearly distinguishes a food product, mixture, or compound from any other food product, mixture, or compound.

(b) A distinctive name shall not be one representing any single constituent of a mixture or compound.

(c) A distinctive name shall not misrepresent any property or quality of a mixture or compound.

(d) A distinctive name shall give no false indication of origin, character, or place of manufacture, nor lead the purchaser to suppose that it is any other food or drug product.

Applying this definition, it will be seen (1) that "Canadian Club whisky" is a trade or arbitrary name which clearly distinguishes the particular mixture of whiskies so designated from any other whisky or mixture of whiskies.

(2) This distinctive name "Canadian Club whisky" is not one representing any single constituent of the mixture, because the word whisky applies to *both* of the component elements of the mixture, and to each of them.

(3) The name "Canadian Club whisky" does not misrepresent any property or quality of the mixture, because within the President's definition each of the elements of the mixture is whisky, and the resultant mixture is whisky.

(4) The name "Canadian Club whisky" gives no false indication of the origin, character, or place of manufacture, because the mixture in fact is made in Canada; nor does it lead the purchaser to suppose that it is any other food or drug product, as it clearly asserts that it is whisky—which is the fact—and in your letter it is stated that it is known by that name and no other to the trade and consumers in the United States and other countries, and no other whisky is known by that name. "Canadian Club whisky" is therefore the distinctive name of a whisky so called; that name distinguishes the product to which it is attached from all other whiskies and clearly identifies it as the particular kind and brand of whiskies made by Hiram Walker & Sons (Limited) at Walkerville, Ontario. The name distinguishes the particular goods in relation to which it is used from other goods of a like character belonging to other people. (Hopkins on Unfair Trade, sec. 2.) It is certainly as distinctive as the designation "S. N. Pike's Magnolia Whiskey," which, in *Kidd v. Johnson* (100 U. S., p. 617), was held to constitute a trade-mark, because distinguishing the whisky of the manufacture of S. N. Pike & Co., and their successors in Cincinnati, from all other whisky.

The brief of the Solicitor of the Department of Agriculture contends that the distinctive name under which a mixture or compound may be sold must, in its entirety, be purely arbitrary or fanciful, and must not contain the name of the component elements of the compound. A mixture of wheat and barley, he concedes, might be sold as "Force" or "Vita" without stating of what elements it was composed, but a mixture of two kinds of barley could not be sold as "Melrose barley" without stating that it was "a blend of barleys." It seems to me that such a construction of the term "distinctive name" is not only unwarranted, but undesirable. The two main purposes which the pure-food law was designed to accomplish are, first, to prevent the sale of adulterated foods, and, second, to prevent deception being practiced on the public. It would seem to me that the latter purpose is more apt to be secured by permitting the sale of a product under its own name, qualified by some distinguishing characterization, than by requiring it to be masked in an anonymity which would give no clue to any of its component elements.

But, without entering into an analysis of the many decisions cited in the briefs of the respective parties, or further pursuing a discussion of the question, it appears to me clear that the name "Canadian Club whisky" is a distinctive name, so arbitrary and so fanciful as to clearly distinguish it from all other kinds of whisky or other things, and a name which, by common use, has come to mean a substance clearly distinguishable by the public from everything else. (See *United States v. 300 Cases of Mapleine*, per Sanborn, D. J.; Notice of Judgment 163, Food and Drugs Act, p. 3.)¹

In my opinion, therefore, it is not necessary that the label under which "Canadian Club whisky" is sold shall state that it is "a blend of whiskies."

I have the honor to be, respectfully,

GEO. W. WICKERSHAM,
Attorney General.

¹ P. 190, *post*.

F. I. D. 128 (Oct. 31, 1910).

SAGO AND TAPIOCA.

It has come to the attention of the Board of Food and Drug Inspection that there exists among the trade in various parts of the United States a very general misunderstanding with respect to sago and small pearl tapioca. Sago is prepared from the starch obtained from the pith found in the stem of several species of palm trees, natives of the East Indies, and tapioca is prepared by heating in a moist state the starch made from the root of the cassava or tapioca plant, which is indigenous to certain South American countries. Both products ordinarily reach the consumer in granulated form and are designated as "pearl sago" and "pearl tapioca," respectively. While "pearl sago" and "pearl tapioca" are separate and distinct articles of commerce, each resembles the other closely in appearance, and fine pearl tapioca frequently has been labeled and sold as sago.

Under the Food and Drugs Act of June 30, 1906, articles of food are misbranded if the labels or packages contain statements which are false or misleading, or if particular articles are imitations of or offered for sale under the distinctive names of other articles. In the opinion of the board, the name "sago," or "pearl sago," without qualification, means the product obtained from the pith of East Indian palm trees, and starch products of different origin will be held to be misbranded under the act if labeled or offered for sale as "sago," "pearl sago," etc. The prepared starch product derived from the root of the cassava plant is tapioca, and should be sold and labeled as such.

There is also on the market an imitation sago made from potato starch. Imitation food products are misbranded under the act unless they are labeled so as to indicate plainly that they are imitation products and unless the word "imitation" is also plainly stated on the packages in which imitation products are offered for sale. Potato or other starch prepared to resemble pearl sago, therefore, should be labeled, for example, "Imitation sago. Made from potato starch," the words "Imitation" and "Made from potato starch" being declared as plainly and conspicuously as the word "sago." The word "Imitation" must appear on the label, but an equivalent expression may be substituted for "Made from potato starch," which will indicate unmistakably that the product is not made from the pith of East Indian palm trees, but is derived from a different source.

F. I. D. 129 (Nov. 8, 1910).

THE CERTIFICATION OF STRAIGHT DYES AND MIXTURES UNDER SECONDARY CERTIFICATES.

(Amendment to F. I. D. 77).¹

In Food Inspection Decision 77 provision is made for the recertification of straight dyes (i. e., the seven accepted dyes of F. I. D. 76) and mixtures thereof, with or without other harmless ingredients.

Doubt has been expressed as to whether the requirements of F. I. D. 77, with respect to certification, are the same for those who are not

¹ See also F. I. D. 51, 76, 77, 92, 102, 106, 117, 148, and 149 relative to the use of colors in foods.

manufacturers as they are for manufacturers. This amendment is issued relative to recertification in order to remove uncertainty and to indicate the scope of F. I. D. 77.

All persons, manufacturers or others, requesting certification of mixtures or recertification of straight dyes, or of mixtures or combinations thereof, shall submit the following form of secondary certificate to the Secretary of Agriculture:

SECONDARY CERTIFICATE.

I, _____, residing at _____, do hereby depose and state that I have
(Full address.)
repacked ____ lbs. of certified lot (or lots) _____ purchased from _____, of _____
This repacking has been accomplished in the following fashion:

(Full description of what has been done with the lot or lots.)
Certified mixture No. J. D. & Co._____, or certified straight dye No. J. D. &
Co._____
Trade name_____

(Name.)
Subscribed and sworn to before me, _____, in and for the _____
of _____ at _____, this _____ day of _____,

(Name of officer authorized to administer oaths.)

When the secondary certificate refers to mixtures, the term "mixture" means—

not only such mixtures as consist wholly of certified coal-tar dyes but also those which contain one or more certified coal-tar dyes (and no other coal-tar dye or dyes) in combination with other components, constituents, or ingredients not coal-tar dyes, which other components, constituents, or ingredients are in and of themselves or in the combination used harmless and not detrimental to health or are not prohibited for use in food products; the exact formula of such mixtures, including all of the components, constituents, or ingredients, or other parts of the mixture, together with a statement of the total weight of mixtures so made, must be deposited with the Secretary of Agriculture. (F. I. D. 106.)

The term "straight dye," as used herein, refers to the seven dyes specified in F. I. D. 76.

In the case of mixtures one (1) pound samples, and in the case of straight dyes one-half ($\frac{1}{2}$) pound samples must be submitted with the secondary certificate. If larger samples are needed in individual cases the department will ask for them.

Only those mixtures will be certified which contain no other dyes than coal-tar dyes previously certified. Mixtures containing animal or vegetable dyes are not subject to certification.

The above form for secondary certificates varies but slightly from that given in Food Inspection Decision No. 77. It contains the addition "Certified mixture No. J. D. & Co._____" and "Certified straight dye No. J. D. & Co._____" When the manufacturer or other person submits a secondary certificate, whichever legend is appropriate to the certificate is to be used. The initials are to be those of the person or firm filing the certificate; the blank space is to be filled with the number of the secondary certificate filed by that particular person or firm. For example, the firm of J. D. & Co. has already filed fourteen secondary certificates, the new one to be filed under the form given above will then be labeled "Certified mixture No. J. D. & Co. 15," or "Certified straight dye No. J. D. & Co. 15," as the case may be.

That is, the recertified straight dyes or certified mixtures are to be given a number in regular order, according to the number of such secondary certificates filed by any person or firm. The completed legend is the one to be used in marketing the products thus submitted under the secondary certificate. Notification will be given of the acceptance or rejection of the certificate when investigation of the product has been completed.

Makers of secondary certificates must submit the trade name of mixtures produced, and no such trade name or keyed modification thereof should be used on any other mixture prepared by the same person or company.

Secondary certificates are to be sent in duplicate to the Department of Agriculture; the duplicate need not, however, be signed or sworn to. The samples should be submitted with the secondary certificates.

F. I. D. 130 (Jan. 18, 1911).¹

AMENDMENT TO REGULATION 5, HEARINGS.

[See regulation 5, p. 18, *ante*.]

F. I. D. 131 (Feb. 27, 1911).

THE COMPOSITION OF EVAPORATED MILK.

For a considerable period of time the Dairy Division of the Bureau of Chemistry has been conducting an extended investigation in regard to the manufacture of evaporated milk (i. e., unsweetened condensed milk) and the character of the milk used by the manufacturers. This investigation has been carried on through the various seasons of the year and in various parts of the country, so that knowledge has been obtained of the seasonal variations in milk from herds of different types, and the different manufacturing methods in use, as well as of the character of the finished product from many sources.

The fault of the standards, as approved by the committee on food standards of the Association of Official Agricultural Chemists and the Interstate Food Commission, published as Circular No. 19 of the Office of the Secretary, lies in the low percentage of fat in the total solids, namely, 27.5 per cent. This low figure the board believes has encouraged the use of a partially skimmed milk, which fact is amply borne out by the many analyses made in the department. Again, this standard of 28 per cent total solids in Circular No. 19 is one not easily attained in all localities of the United States, during all seasons, by the usual methods of manufacture under ordinary working conditions, with the production of a satisfactory marketable article.

Considering the natural variations in the richness of milk from different breeds of cows and at different times of the year, as well as the practical conditions of manufacture, the department has decided upon the following requirements, which it considers reasonable and just, with respect to the manufacture and composition of evaporated milk (i. e., unsweetened condensed milk):

(1) It should be prepared by evaporating the fresh, pure, whole milk of healthy cows, obtained by complete milking and excluding all

¹ Signed by the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor.

milking within 15 days before calving and 7 days after calving, provided at the end of this 7-day period the animals are in a perfectly normal condition.

(2) It should contain such percentages of total solids and of fat that the sum of the two shall be not less than 34.3 and the percentage of fat shall be not less than 7.8 per cent. This allows a small reduction in total solids with increasing richness of the milk in fat.

(3) It should contain no added butter or butter oil incorporated either with whole milk or skimmed milk or with the evaporated milk at any stage of manufacture.

In view of the well-known tendency of factory analyses—often of necessity made rapidly and by persons not skilled as analysts—to give results above the truth with respect to fat, and especially with respect to total solids, manufacturers are advised always to allow a safe margin between their factory practice and the above-stated requirements as to percentage composition. This can be done without difficulty in all localities and at all seasons of the year.

F. I. D. 132 (Mar. 28, 1911).

THE USE OF HOMOGENIZED BUTTER AND SKIMMED MILK IN THE MANUFACTURE OF ICE CREAM.

Investigations have shown that there has lately come into use in the trade an apparatus known as a "homogenizer," which has the faculty of so disrupting the globules of fat that a whole milk homogenized does not permit the separation of the cream through the ordinary gravity methods. In like manner butter or other fat and skimmed milk passed through the homogenizer form a product from which the butter does not separate on standing and which resembles in its other physical characteristics whole milk.

Investigations have further shown that butter and skimmed milk are passed through the homogenizer to form a so-called "cream," which is used in place of real cream in the manufacture of ice cream.

The board is of the opinion that skimmed milk and butter fat in appropriate proportions passed through the homogenizer are not entitled to the name of "milk" or the name of "cream," as the case may be, according to the quantity of fat which is present. The board is further of the opinion that the product made from a homogenized butter or skimmed milk can not be properly called "ice cream."

F. I. D. 133 (Mar. 28, 1911).

THE COLORING OF GREEN CITRUS FRUITS.

The attention of the Board of Food and Drug Inspection has been directed to the shipment in interstate commerce of green, immature citrus fruits, particularly oranges, which have been artificially colored by holding in a warm, moist atmosphere for a short period of time after removal from the tree. Evidence is adduced showing that such oranges do not change in sugar or acid content after removal from the tree. Evidence further shows that the same oranges remaining on the tree increase markedly in sugar content and decrease

in acid content. Further, there is evidence to show that the consumption of such immature oranges, especially by children, is apt to be attended by serious disturbances of the digestive system.

Under the Food and Drugs Act of June 30, 1906, an article of food is adulterated "if it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed." It is the opinion of the board that oranges treated as mentioned above are colored in a manner whereby inferiority is concealed and are, therefore, adulterated.

The board recognizes the fact that certain varieties of oranges attain maturity as to size, sweetness, and acidity before the color changes from green to yellow, and this decision is not intended to interfere with the marketing of such oranges.

F. I. D. 134 (Apr. 12, 1911).

THE LABELING OF NEW ORLEANS MOLASSES.

It appears from an investigation conducted by the Board of Food and Drug Inspection that there is a wide variety of opinions with respect to the meaning of the term "New Orleans molasses." The evidence at hand shows that "New Orleans" molasses is generally understood to be a product of Louisiana. It is apparent that the original significance of the term "New Orleans" molasses as applied to open-kettle drippings or "bleedings" has disappeared.

The Food and Drugs Act requires a label to be free from any statement which is false or misleading in any particular. In view of the general understanding of the term "New Orleans" molasses the board is of the opinion that the term "New Orleans" should be restricted to molasses produced in Louisiana. In addition, all molasses so labeled may bear the further statement of its quality or grade, namely, "open kettle," "first centrifugal," "second centrifugal," "black strap," etc.

F. I. D. 135 (Apr. 26, 1911).¹

SACCHARIN IN FOOD.²

At the request of the Secretary of Agriculture, the Referee Board of Consulting Scientific Experts has conducted an investigation as to the effect on health of the use of saccharin. The investigation has been concluded, and the referee board reports that the continued use of saccharin for a long time in quantities over three-tenths of a gram per day is liable to impair digestion; and that the addition of saccharin as a substitute for cane sugar or other forms of sugar reduces the food value of the sweetened product and hence lowers its quality.

Saccharin has been used as a substitute for sugar in over thirty classes of foods in which sugar is commonly recognized as a normal and valuable ingredient. If the use of saccharin be continued it is evident that amounts of saccharin may readily be consumed which will, through continual use, produce digestive disturbances. In every

¹ Signed by the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor.

² See also F. I. D. 138, 142 and 146, on saccharin in foods.

food in which saccharin is used, some other sweetening agent known to be harmless to health can be substituted, and there is not even a pretense that saccharin is a necessity in the manufacture of food products. Under the Food and Drugs Act articles of food are adulterated if they contain added poisonous or other added deleterious ingredients which may render them injurious to health. Articles of food are also adulterated within the meaning of the act, if substances have been mixed and packed with the foods so as to reduce or lower or injuriously affect their quality or strength. The findings of the referee board show that saccharin in food is such an added poisonous or other added deleterious ingredient as is contemplated by the act, and also that the substitution of saccharin for sugar in foods reduces and lowers their quality.

The Secretary of Agriculture, therefore, will regard as adulterated under the Food and Drugs Act foods containing saccharin which, on and after July 1, 1911,¹ are manufactured or offered for sale in the District of Columbia or the Territories, or shipped in interstate or foreign commerce, or offered for importation into the United States.

F. I. D. 136 (May 20, 1911).

LABELING OF CHOCOLATE AND COCOA.

After consideration of the evidence submitted in regard to the meaning of the terms "chocolate" and "cocoa," the Board of Food and Drug Inspection has reached the conclusion that the definitions laid down in the "Standards of Purity for Food Products," adopted by the Committee on Food Standards, Association of Official Agricultural Chemists, and printed in Circular No. 19, Office of the Secretary of Agriculture, are substantially correct. By these definitions the names "chocolate," "plain chocolate," "bitter chocolate," "chocolate liquor," and "bitter chocolate coatings," are applied to the solid or plastic mass obtained by grinding cocoa nibs without the removal of fat or other constituents except the germ, containing not more than three (3) per cent of ash insoluble in water, three and fifty hundredths (3.50) per cent of crude fiber, and nine (9) per cent of starch, and not less than forty-five (45) per cent of cocoa fat.

"Sweet chocolate" and "sweet chocolate coatings" are terms applied to chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials, and contain in the sugar and fat-free residue no higher percentage of either ash, fiber, or starch than is found in the sugar and fat-free residue of chocolate.

Cocoa, and powdered cocoa, are terms applied to cocoa nibs, with or without the germ, deprived of a portion of its fat and finely pulverized, and contain percentages of ash, crude fiber, and starch corresponding to those in chocolate after correction for fat removed.

Sweet cocoa, and sweetened cocoa, are terms applied to cocoa mixed with sugar (sucrose), and contain not more than sixty (60) per cent of sugar (sucrose), and in the sugar and fat-free residue no higher percentage of either ash, crude fiber, or starch than is found in the sugar and fat-free residue of chocolate.

¹ Date changed to Jan. 1, 1912, by F. I. D. 158.

Cocoa nibs, and cracked cocoa, are the roasted broken seeds of the cacao tree freed from shell or husk.

Milk chocolate and milk cocoa, in the opinion of the board, should contain not less than 12 per cent of milk solids, and the so-called nut chocolates should contain substantial quantities of nuts. If sugar is added, for example, to milk chocolate, it should be labeled "sweet milk chocolate," "sweet nut chocolate," etc.

When cocoa is treated with an alkali or an alkaline salt, as in the so-called Dutch process, and the finished cocoa contains increased mineral matter as the result of this treatment, but no alkali as such is present, the label should bear a statement to the effect that the cocoa contains added mineral ingredients, stating the amount. Cocoas and chocolates containing an appreciable amount of free alkali are adulterated. In the opinion of the board, cocoa not treated with alkali is not soluble in the ordinary acceptance of the term. Cocoa before and after treatment with alkali shows essentially the same lack of solubility. To designate the alkali-treated cocoa as "soluble" cocoa is misleading and deceptive.

F. I. D. 137 (June 16, 1911).

THE USE OF CHARLOCK AS A SUBSTITUTE FOR MUSTARD.

It has come to the attention of the Board of Food and Drug Inspection that the seed of charlock (*Brassica arvensis* L.) is being substituted by some manufacturers, in whole or in part, for that of the true mustards, viz, yellow or white mustard (*Sinapis alba* L., synonym *Brassica alba* [L.] Boiss.), brown mustard (*B. juncea* L.), and black mustard (*B. nigra* L.).

It is the opinion of the board that when charlock is substituted in part for mustard the label should clearly indicate this fact. A condiment prepared from mustard or mustard flour and charlock with salt, spices, and vinegar is not "Prepared Mustard," but, provided a greater quantity of mustard than of charlock is used, it should be called "Prepared Mustard and Charlock."

F. I. D. 138 (June 20, 1911).¹

SACCHARIN IN FOOD.²

Paragraph 3 of Food Inspection Decision No. 135 is hereby modified to read as follows:

The Secretary of Agriculture, therefore, will regard as adulterated under the Food and Drugs Act foods containing saccharin which, on and after January 1, 1912, are manufactured or offered for sale in the District of Columbia or the Territories, or shipped in interstate or foreign commerce, or offered for importation into the United States.

¹ Signed by the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor.

² See also F. I. D. 135, 142, and 146 on saccharin in foods.

F. I. D. 139 (Feb. 10, 1912).

USE OF THE TERM "SWEET OIL."

From time to time this department has received inquiries asking whether or not it is permissible, under the Food and Drugs Act, to label cottonseed oil as "sweet oil." Investigations have shown that some samples marked "sweet oil" consist of cottonseed oil or a mixture of olive oil and cottonseed oil. A careful consideration of the subject leads to the conclusion that the only oil to which the term "sweet oil" may be correctly applied is olive oil.

It is held, therefore, that any oil other than olive oil is misbranded when sold under the name "sweet oil." It is not correct, for example, to label cottonseed oil as "sweet oil" and then elsewhere on the label to describe correctly the true character of the oil.

F. I. D. 140 (Feb. 12, 1912).

LABELING OF VINEGARS.

The Board of Food and Drug Inspection has given this question much consideration. A public hearing was given, a series of questions submitted to the various State food commissioners, interested manufacturers, wholesalers, retailers, and consumers, and a study of the various State laws and regulations was made, believing that these represent the general understanding of the terms by the people of those States. From the information thus obtained the board has reached the conclusion that the definitions given in Circular No. 19, Office of the Secretary, are in accordance with the facts. These are as follows:

1. *Vinegar, cider vinegar, apple vinegar*, is the product made from the alcoholic and subsequent acetous fermentations of the expressed juice of apples.

2. *Wine vinegar, grape vinegar*, is the product made by the alcoholic and subsequent acetous fermentations of the juice of grapes.

3. *Malt vinegar* is the product made by the alcoholic and subsequent acetous fermentations, without distillation, of an infusion of barley malt or cereals whose starch has been converted by malt.

4. *Sugar vinegar* is the product made by the alcoholic and subsequent acetous fermentations of solutions of sugar, sirup, molasses, or refiner's sirup.

5. *Glucose vinegar* is the product made by the alcoholic and subsequent acetous fermentations of solutions of starch sugar or glucose.

6. *Spirit vinegar, distilled vinegar, grain vinegar*, is the product made by the acetous fermentation of dilute distilled alcohol.

Several questions regarding these definitions have been raised and after investigation the board has reached the following conclusions:

Meaning of the term "vinegar."—While the term "vinegar" in its etymological significance suggests only sour wine, it has come to have a broader significance in English-speaking countries. In the United States it has lost entirely its original meaning and when used without a qualifying word designates only the product secured by the alcoholic and subsequent acetous fermentation of apple juice.

"Second pressings."—It is held that the number of pressings used in preparing the juice is immaterial so long as the pomace is fresh and not decomposed. The practice of allowing the pomace from the presses to stand in piles or in vats for a number of days, during which time it becomes heated and decomposed, and then pressing, securing what is ordinarily called "second pressing," in the opinion of the board produces a product which consists in whole or in part of a filthy and decomposed material and is therefore adulterated.

Vinegar from dried-apple products.—The product made from dried-apple skins, cores, and chops, by the process of soaking, with subsequent alcoholic and acetous fermentations of the solution thus obtained, is not entitled to be called vinegar without further designation, but must be plainly marked to show the material from which it is produced. The dried stock from which this product is prepared must be clean and made from sound material.

Addition of water.—When natural vinegars made from cider, wine, or the juice of other fruits are diluted with water, the label must plainly indicate this fact; as, for example, "diluted to — per cent acid strength." When water is added to pomace in the process of manufacture, the fact that the product is diluted must be plainly shown on the label in a similar manner. Dilution of vinegar naturally reduces, not only the acid strength, but the amount of other ingredients in proportion to the dilution, so that reduced vinegars will not comply with the analytical constants for undiluted products; but the relations existing between these various ingredients will remain the same. Diluted vinegars must have an acid strength of at least 4 grams acetic acid per 100 cubic centimeters.

Mixtures of vinegars.—As different kinds of vinegar differ in source, flavor, and chemical composition, mixtures thereof are compounds within the meaning of the Food and Drugs Act, and if they contain no added poisonous or other added deleterious ingredients, will not be held to be misbranded if plainly labeled with the word "compound," together with the names and proportions of the various ingredients.

Addition of boiled cider and coloring matter.—The Food and Drugs Act provides that a product shall be deemed to be adulterated if it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed; and, in the opinion of the board, the addition of coloring matters, boiled cider, etc., to vinegar, wine vinegar, and the other types of vinegar, or mixtures thereof, is for the purpose of concealing damage or inferiority or producing an imitation product. In the first instance, the use of such products is an adulteration and therefore prohibited. Products artificially colored or flavored with harmless ingredients in imitation of some particular kind of vinegar will not be held to be misbranded if plainly labeled "Imitation vinegar" in accordance with the provisions of the law.¹

Mixture of distilled and sugar vinegars.—The product prepared by submitting to acetous fermentation a mixture of dilute alcohol (obtained, for example, from molasses by alcoholic fermentation and subsequent distillation) and dilute molasses, which has undergone

¹ See *United States v. 10 Barrels of Vinegar*, p. 410, *post*; and *United States v. 100 Barrels of Vinegar*, p. 448, *post*.

alcoholic fermentation, is not "molasses vinegar" but a compound of distilled vinegar and molasses vinegar; such mixtures, however, must contain a substantial amount of molasses vinegar and not a small amount for the purpose of coloring the distilled vinegar. The molasses used must be fit for food purposes and free from any added deleterious substances.

Acetic acid diluted.—The product made by diluting acetic acid is not vinegar and when intended for food purposes must be free from harmful impurities and sold under its own name.

Product obtained by distilling wood.—The impure product made by the destructive distillation of wood, known as "pyroligenous acid," is not vinegar nor suitable for food purposes.

Acid strength.—All of the products described above should contain not less than four (4) grams of acetic acid per one hundred (100) cubic centimeters.

F. I. D. 141 (Feb. 17, 1912).

THE LABELING OF MARASCHINO AND MARASCHINO CHERRIES.¹

The question of the proper labeling of the products designated as "Maraschino Cherries," "Cherries of Maraschino," "Bigarreau au Marasquin," etc., has been presented to the board for consideration; and after due investigation and examination of the evidence secured, the board is of the opinion that the term "Maraschino Cherries" should be applied only to the marasca cherries preserved in maraschino.

Maraschino is a liqueur or cordial prepared by process of fermentation and distillation from the marasca cherry, a small variety of the European wild cherry indigenous to the Dalamatian Mountains. Liqueurs or cordials prepared in imitation of maraschino with artificial flavors or otherwise will not be held to be misbranded if plainly labeled "Imitation" in some manner to show their true character.

In considering the products prepared from the large light-colored cherry of the Napoleon Bigarreau, or Royal Anne type, which are artificially colored and flavored and put up in a sugar sirup, flavored with various materials, the board has reached the conclusion that this product is not properly entitled to be called "Maraschino Cherries," or "Cherries in Maraschino." If, however, these cherries are packed in a sirup, flavored with maraschino alone, it is the opinion of the board that they would not be misbranded, if labeled "Cherries, Maraschino Flavor," or "Maraschino Flavored Cherries." If these cherries are packed in maraschino liqueur there would be no objection to the phrase "Cherries in Maraschino." When these artificially colored cherries are put up in a sirup flavored in imitation of maraschino, even though the flavoring may consist in part of maraschino, it would not be proper to use the word "Maraschino" in connection with the product unless preceded by the word "Imitation." They may, however, be labeled to show that they are a preserved cherry, artificially colored and flavored.

¹ See *United States v. Bettman-Johnson Co.*, p. 460, *post*.

The presence of artificial coloring or flavoring matter, of any substitute for cane sugar, and the presence and amount of benzoate of soda, when used in these products must be plainly stated upon the label in the manner provided in Food Inspection Decisions Nos. 52 and 104.

The same principle applies to the labeling of cherries put up in sirup flavored with crème de menthe or other flavors.

F. I. D. 142 (Feb. 29, 1912).¹

SACCHARIN IN FOOD.²

The following decision which relates to the use of saccharin in food will not go into effect until the 1st of April, 1912, the month of March being given to interested parties so as to arrange their business and take such steps as they deem proper.

After full consideration of the representations made in behalf of the manufacturers of saccharin at the hearing before us and of the briefs filed by their attorneys, as well as the briefs filed, at our request, by officers of the Department of Agriculture, we conclude that the use of saccharin in normal foods, within the jurisdiction of the Food and Drugs Act, is a violation of law and will be prosecuted.

It is true that the referee board did not find that the use in foods of saccharin in small quantities (up to 0.3 gram daily) is injurious to health. However, the referee board did find that saccharin used in quantities over 0.3 gram per day for a considerable period is liable to disturb digestion, and the Food and Drugs Act provides that articles of food are adulterated which contain any added poisonous or other added deleterious ingredient which may render them injurious to health.

The Bureau of Chemistry of the Department of Agriculture reports that saccharin has been found in more than fifty kinds of foods in common use. It is argued, therefore, that if the use of saccharin in foods be allowed, the consumer may very easily ingest, day by day, over 0.3 gram, the quantity which, according to the findings of the referee board, is liable to produce disturbances of digestion. On the other hand, it is claimed by the manufacturers that the sweetening power of saccharin is so great that, in a normal dietary, the amount of saccharin ingested daily would not exceed 0.3 gram, the amount found to be harmless by the referee board.

However this may be, it is plain, from the finding of the referee board, that the substitution of saccharin for sugar lowers the quality of the food. The only use of saccharin in foods is as a sweetener, and when it is so used, it inevitably displaces the sugar of an equivalent sweetening power. Sugar has a food value and saccharin has none. It appears, therefore, that normal foods sweetened with saccharin are adulterated under the law.

In making this decision we are not unmindful of the fact that persons suffering from certain diseases may be directed by their physicians to abstain from the use of sugar. In cases of this kind, saccharin is often prescribed as a substitute sweetening agent. This de-

¹ Signed by the Secretary of Agriculture and the Secretary of Commerce and Labor, the Secretary of the Treasury dissenting.

² See also F. I. D. 135, 138, and 146 on saccharin in foods.

cision will not in any manner interfere with such a use of saccharin. The Food and Drugs Act provides that any substance which is intended to be used for the prevention, cure, or mitigation of disease is a drug, and a product containing saccharin and plainly labeled to show that the mixture is intended for the use of those persons who, on account of disease, must abstain from the use of sugar, falls within the class of drugs and is not affected by this decision.

F. I. D. 143 (Apr. 15, 1912).

THE LABELING OF CANDIED CITRON.

The Board of Food and Drug Inspection has given consideration to the question of what is the correct use of the term "Candied citron," when applied to the preserved peel of fruits.

The evidence gathered by the board shows distinctly that the term "Candied citron" is generally recognized in the trade, and by the consumer, to be applicable only to the candied peel of fruit of the citron tree, *Citrus medica* L., variety *genuina* Engl., a citrus fruit similar to the lemon, but larger and possessing a thick rind of characteristic flavor.

The rind of the citrus melon, *Citrullus vulgaris* Schrad., is often used in a similar manner to true candied citron. The board is of the opinion that the candied rind of this variety of watermelon, when sold in interstate commerce, must not be designated as "Candied citron." It should be labeled "Candied citron melon," "Candied watermelon," or some similar designation.

It is also considered that such terms as "American citron," "Candied domestic citron," or the like, are not correct designations for the candied citron melon and when used will be deemed misbranding, except when applied to the American product of the citrus fruit "citron," described above.

F. I. D. 144 (May 22, 1912).

CANNED FOODS: USE OF WATER, BRINE, SIRUP, SAUCE, AND SIMILAR SUBSTANCES IN THE PREPARATION THEREOF.¹

The can in canned food products serves not only as a container but also as an index of the quantity of food therein. It should be as full of food as is practicable for packing and processing without injuring the quality or appearance of the contents. Some food products may be canned without the addition of any other substances whatsoever—for example, tomatoes. The addition of water in such instances is deemed adulteration. Other foods may require the addition of water, brine, sugar, or sirup, either to combine with the food for its proper preparation or for the purpose of sterilization—for instance, peas. In this case the can should be packed as full as practicable with the peas and should contain only sufficient liquor to fill the interstices and cover the product.

¹ See F. I. D. 66 on the use of sugar in canned foods.

Canned foods, therefore, will be deemed to be adulterated if they are found to contain water, brine, sirup, sauce, or similar substances in excess of the amount necessary for their proper preparation and sterilization.¹

It has come to the notice of the department that pulp prepared from trimmings, cores, and other waste material is sometimes added to canned tomatoes. It is the opinion of the board that pulp is not a normal ingredient of canned tomatoes, and such addition is therefore adulteration. It is the further opinion of the board that the addition of tomato juice in excess of the amount present in the tomatoes used is adulteration—that is, if in the canning of a lot of tomatoes more juice be added than is present in that lot, the same will be considered an adulteration.

F. I. D. 145 (June 24, 1912).

BLEACHED OATS AND BARLEY.

The Department of Agriculture has received numerous inquiries relative to the application of the Food and Drugs Act to oats, barley, and other grains bleached with the fumes of sulphur. It appears that by this process grains which are damaged or of inferior quality may be made to resemble those of higher grade or quality, and their weight increased by addition of water. Such products, therefore, are adulterated within the meaning of the Food and Drugs Act of June 30, 1906, and can not be either manufactured or sold in the District of Columbia, or in the Territories, or transported or sold in interstate commerce.

It is represented, however, that grains which are weather-stained, or soil-stained, the quality of which is in no wise injured in other respects, are sometimes bleached with sulphur fumes. Pending the report of the Referee Board of Consulting Scientific Experts as to the effect upon health of sulphur dioxid, and the results of experiments being made by this Department as to the effect of sulphur-bleached grains on animals, no objection will be made to traffic in sound and wholesome grains which have been bleached with sulphur dioxid and from which the excess water has been removed, provided that each and every package is plainly labeled to show that the contents have been treated with sulphur dioxid. Bulk shipments should be properly designated on invoices. The terms "purified," "purified with sulphur," "processed," etc., are misleading and not proper designations for these products.

Attention is called to the fact that grains bleached with sulphur fumes may have their germinating properties very seriously impaired.

F. I. D. 146 (June 22, 1912).

ON THE USE OF SACCHARIN IN FOODS.²

There appears to exist a misconception of the position of the Department of Agriculture as to the use of saccharin in foods as announced in Food Inspection Decision No. 142. That decision pro-

¹ See *United States v. Potter*, p. 376, *post*.

² See also F. I. D. 135, 138, and 142 on the use of saccharin in food.

hibits the use of saccharin in foods. The law defines the term "drug" and it is considered that saccharin has its proper place in products coming within this definition.

It is recognized that certain specific products generally classified as foods, and sweetened with saccharin, may be required for the mitigation or cure of disease. It is not intended to prohibit the manufacture or sale of such products, provided they are labeled so as to show their true purpose and the presence of saccharin is plainly declared upon the principal label. This must not be interpreted to mean that the use of saccharin in foods prepared for ordinary consumption is permissible even if declared on the label.

F. I. D. 147 (July 12, 1912).

ABSINTH.

It is generally recognized in countries which have had experience with the sale and consumption of absinth that this beverage is dangerous to health. Belgium, Switzerland, and Holland have forbidden its manufacture, sale, and importation; absinth is also condemned by the laws of Brazil and its importation forbidden.

The Food and Drugs Act of June 30, 1906, section 11, forbids the importation of any food or drug which is "of a kind forbidden entry into, or forbidden to be sold or restricted in sale in the country in which it is made, or from which it is exported," and also of any food or drug which is "otherwise dangerous to the health of the people of the United States."

Importations of absinth into the United States, therefore, are prohibited, both because they come from countries which forbid or restrict its manufacture and sale, and because these products are injurious to the health of the people of the United States.

Section 7, paragraph 5, in the case of foods, of the Food and Drugs Act, June 30, 1906, provides further that an article shall be deemed to be adulterated within the meaning of the Act "if it contains any added poisonous or other added deleterious ingredient which may render such article injurious to health." The beverage commonly known as absinth is a manufactured product containing wormwood, or absinth (*Artemisia absinthium*), an added deleterious ingredient. The interstate shipment of this product is, therefore, prohibited under the provisions of the Food and Drugs Act.

The Secretary of Agriculture, therefore, will regard as adulterated under the Food and Drugs Act absinth which, on and after October 1, 1912, is manufactured or offered for sale in the District of Columbia or the Territories, or shipped in interstate commerce or offered for importation into the United States.

F. I. D. 148 (July 12, 1912).

USE OF COPPER SALTS IN THE GREENING OF FOODS.¹

The question of the use of copper salts in the greening of foods was referred by the Secretary of Agriculture, on March 11, 1909, to the Referee Board of Consulting Scientific Experts. Exhaustive inves-

¹ See also F. I. D. 76, 92, 102, and 149 on the use of copper salts in the greening of foods.

tigations have been conducted by that board and the Department of Agriculture has received the report of the investigations. The questions which were referred to the referee board are as follows:

Are vegetables greened with copper salts adulterated under the Food and Drugs Act of June 30, 1906, because,

(a) a substance has been mixed or packed with them so as to reduce or lower or injuriously affect their quality or strength;

(b) they have been mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed;

(c) they contain any added poisonous or other added deleterious ingredient which may render such articles injurious to health?

(1) in large quantities?

(2) in small quantities?

The main general conclusions reached by the Referee Board from a study of their experimental results and other considerations are as follows:

(a) Copper salts used in the coloring of vegetables as in commercial practice can not be said to reduce or lower or injuriously affect the quality or strength of such vegetable as far as the food value is concerned;

(b) Copper salts used in the greening of vegetables may have the effect of concealing inferiority inasmuch as the bright green color imparted to the vegetable stimulates a state of freshness they may not have possessed before treatment;

(c) In attempting to define a large daily quantity of copper regard must be had to the maximum amount of greened vegetables which might be consumed daily. A daily dose of 100 grams of coppered peas or beans, which are the most highly colored vegetables in the market, would not ordinarily contain more than 100 to 150 milligrams of copper. Such a bulk of greened vegetables is so large however, that it would hardly be chosen as a part of a diet for many days in succession. Any amount of copper above 150 milligrams daily, may, therefore, be considered excessive in practice. A small quantity is that amount which in the ordinary use of vegetables may be consumed over longer periods. From this point of view 10 to 12 milligrams of copper may be regarded as the upper limit of a small quantity.

It appears from our investigations that, in certain directions, even such small quantities of copper may have a deleterious action and must be considered injurious to health.

The Food and Drugs Act of June 30, 1906, provides that a food is adulterated "if it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health." The act also provides that a food is adulterated "if it be * * * colored * * * in a manner whereby damage or inferiority is concealed." It is apparent from the findings of the referee board that all foods greened with copper salts are positively adulterated under the first above-quoted provision of the law, and that in certain cases foods may be adulterated under the second above-quoted provision.

The Secretary of Agriculture, therefore, will regard as adulterated under the Food and Drugs Act foods greened with copper salts which, on and after January 1, 1913, are offered for entry into the United States, or are manufactured or offered for sale in the District of Columbia or the Territories, or are shipped in interstate commerce.¹

All previous food inspection decisions on the subject of greening of foods with copper salts are amended accordingly.

The complete report of the investigations and conclusions of the referee board on this subject will be published by the Department of Agriculture.

¹ Amended by F. I. D. 149.

F. I. D. 149 (Dec. 26, 1912).

USE OF COPPER SALTS IN THE GREENING OF FOODS.¹

Paragraph 4 of Food Inspection Decision 148 is hereby modified to read as follows:

The Secretary of Agriculture, therefore, will regard as adulterated, under the Food and Drugs Act, foods greened with copper salts which, on and after January 1, 1913, are offered for entry into the United States or are manufactured or offered for sale in the District of Columbia or the Territories, or which, on and after May 1, 1913, are shipped in interstate commerce.

F. I. D. 150 (Jan. 24, 1913).

FROZEN CITRUS FRUIT.

It has come to the attention of the Board of Food and Drug Inspection that, as a result of a recent freeze, citrus fruit that has been badly damaged by frost is being placed on the market.

Citrus fruit is injured in flavor by freezing and soon becomes dry and unfit for food. The damage is evidenced at first by a more or less bitter flavor, followed by a marked decrease in sugar, and especially in acid content. Fruit which has been materially damaged by freezing is inferior and decomposed within the meaning of the Food and Drugs Act.

For the guidance of those engaged in shipping citrus fruit, it is announced that, pending further investigation, the following principles will be observed in enforcing the Food and Drugs Act:

Citrus fruit will be deemed adulterated within the meaning of the Food and Drugs Act if the contents of any package found in interstate commerce contain 15 per cent or more of citrus fruit which, on a transverse section through the center, shows a marked drying in 20 per cent or more of the exposed pulp.

F. I. D. 151 (June 16, 1913).²

APPLICATION OF REGULATIONS.

Regulation 39 of the Rules and Regulations made in pursuance of the authority conferred by section 3 of the Food and Drugs Act, June 30, 1906 (34 Stat., 768), which reads as follows:

REGULATION 39. APPLICATION OF REGULATIONS.

These regulations shall not apply to domestic meat and meat food products which are prepared, transported, or sold in interstate or foreign commerce under the meat-inspection law and the regulations of the Secretary of Agriculture made thereunder.

is hereby revoked.

¹ See also F. I. D. 76, 92, 102, and 148 on the use of copper salts in the greening of foods.

² Signed by the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce. The title of the Secretary of Commerce and Labor changed to Secretary of Commerce by act of Mar. 4, 1913, 37 Stat., 736. See also opinion of the Attorney General of May 24, 1913, p. 800, *post*.

F. I. D. 152 (Aug. 29, 1913).

BRANDY.

The Board of Food and Drug Inspection is of the opinion that brandy is the alcoholic distillate obtained solely from the fermented juice of fruit, distilled under such conditions that the characteristic bouquet, or volatile flavoring and aromatic principles, is retained in the distillate.

Grape brandy is the distillate obtained from grape wine under these conditions.

Apple, peach, and other fruit brandies are similarly prepared from the fermented juices of the respective fruits.

The board is of the further opinion that so-called brandy prepared from grain, potato, or other form of industrial alcohol, or from alcohol obtained from the by-products of wine manufacture, mixed with more or less true brandy or other flavoring material, is adulterated and misbranded unless labeled to indicate its true composition.

F. I. D. 153 (May 5, 1914).¹

AMENDMENT TO REGULATION 9, RELATING TO GUARANTIES BY WHOLESALERS, JOBBERS, MANUFACTURERS, AND OTHER PARTIES RESIDING IN THE UNITED STATES TO PROTECT DEALERS FROM PROSECUTION.

Regulation 9 of the Rules and Regulations for the enforcement of the Food and Drugs Act, June 30, 1906 (34 Stat., 768), is hereby amended, effective May 1, 1915, so as to read as follows:

REGULATION 9. GUARANTY.

(Section 9.)

(a) It having been determined that the legends "Guaranteed under the Food and Drugs Act, June 30, 1906," and "Guaranteed by (name of guarantor), under the Food and Drugs Act, June 30, 1906," borne on the labels or packages of food and drugs, accompanied by serial numbers given by the Secretary of Agriculture, are each misleading and deceptive, in that the public is induced by such legends and serial numbers to believe that the articles to which they relate have been examined and approved by the Government and that the Government guarantees that they comply with the law, the use of either legend, or any similar legend, on labels or packages should be discontinued. Inasmuch as the acceptance by the Secretary of Agriculture for filing of the guaranties of manufacturers and dealers and the giving by him of serial numbers thereto contribute to the deceptive character of legends on labels and packages, no guaranty in any form shall hereafter be filed with and no serial number shall hereafter be given to any guaranty by the Secretary of Agriculture. All guaranties now on file with the Secretary of Agriculture shall be stricken from the files, and the serial numbers assigned to such guaranties shall be canceled.

(b) The use on the label or package of any food or drug of any serial number required to be canceled by paragraph (a) of this regulation is prohibited.

(c) Any wholesaler, manufacturer, jobber, or other party residing in the United States may furnish to any dealer to whom he sells any article of food or drug a guaranty that such article is not adulterated or misbranded within the meaning of the Food and Drugs Act, June 30, 1906, as amended.

(d) Each guaranty to afford protection shall be signed by, and shall contain the name and address of, the wholesaler, manufacturer, jobber, dealer, or other

¹ Signed by the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce. Amended by F. I. D. 155.

party residing in the United States making the sale of the article or articles covered by it to the dealer, and shall be to the effect that such article or articles are not adulterated or misbranded within the meaning of the Federal Food and Drugs Act.

(e) Each guaranty in respect to any article or articles should be incorporated in or attached to the bill of sale, invoice, bill of lading, or other schedule, giving the names and quantities of the article or articles sold, and should not appear on the labels or packages.

(f) No dealer in food or drug products will be liable to prosecution if he can establish that the articles were sold under a guaranty given in compliance with this regulation.

F. I. D. 154 (May 11, 1914).¹

REGULATION OF MARKING THE QUANTITY OF FOOD IN PACKAGE FORM.

Under section 3 of the Food and Drugs Act of June 30, 1906 (34 United States Statutes at Large, pages 768 to 772), as amended by the act of March 3, 1913, entitled "An act to amend section eight of an act entitled 'An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes,' approved June thirtieth, nineteen hundred and six" (37 United States Statutes at Large, page 732), regulation 29 of the Rules and Regulations for the Enforcement of the Food and Drugs Act is hereby amended so as to read as follows:

STATEMENT OF WEIGHT, MEASURE, OR COUNT.

(Section 8, paragraph 3, under "Food," as amended by act of March 3, 1913.)

(a) Except as otherwise provided by this regulation, the quantity of the contents, in all cases of food, if in package form, must be plainly and conspicuously marked, in terms of weight, measure, or numerical count, on the outside of the covering or container usually delivered to consumers.

(b) The quantity of the contents so marked shall be the amount of food in the package.

(c) The statement of the quantity of the contents shall be plain and conspicuous, shall not be a part of or obscured by any legend or design, and shall be so placed and in such characters as to be readily seen and clearly legible when the size of the package and the circumstances under which it is ordinarily examined by purchasers or consumers are taken into consideration.

(d) If the quantity of the contents be stated by weight or measure, it shall be marked in terms of the largest unit contained in the package; for example, if the package contain a pound, or pounds, and a fraction of a pound, the contents shall be expressed in terms of pounds and fractions thereof; or of pounds and ounces, and not merely in ounces.

(e) Statements of weight shall be in terms of avoirdupois pounds and ounces; statements of liquid measure shall be in terms of the United States gallon of 231 cubic inches and its customary subdivisions, i. e., in gallons, quarts, pints, or fluid ounces, and shall express the volume of the liquid at 68° F. (20° C.); and statements of dry measure shall be in terms of the United States standard bushel of 2,150.42 cubic inches and its customary subdivisions, i. e., in bushels, half bushels, pecks, quarts, pints, or half pints: *Provided*, That, by like method, such statements may be in terms of metric weight or measure.

(f) The quantity of solids shall be stated in terms of weight and of liquids in terms of measure, except that in case of an article in respect to which there exists a definite trade custom otherwise, the statement may be in terms of weight or measure in accordance with such custom. The quantity of viscous or semisolid foods, or of mixtures of solids and liquids, may be stated either

¹ Signed by the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce.

by weight or measure, but the statement shall be definite and shall indicate whether the quantity is expressed in terms of weight or measure, as, for example, "Weight, 12 ounces," or "12 ounces avoirdupois"; "volume, 12 ounces," or "12 fluid ounces."

(g) The quantity of the contents shall be stated in terms of weight or measure unless the package be marked by numerical count and such numerical count gives accurate information as to the quantity of the food in the package.

(h) The quantity of the contents may be stated in terms of minimum weight, minimum measure, or minimum count, for example, "minimum weight, 16 ounces"; "minimum volume, 1 gallon," or "not less than 4 ounces"; but in such case the statement must approximate the actual quantity, and there shall be no tolerance below the stated minimum.

(i) The following tolerances and variations from the quantity of the contents marked on the package shall be allowed:

(1) Discrepancies due exclusively to errors in weighing, measuring, or counting which occur in packing conducted in compliance with good commercial practice.

(2) Discrepancies due exclusively to differences in the capacity of bottles and similar containers resulting solely from unavoidable difficulties in manufacturing such bottles or containers so as to be of uniform capacity: *Provided*, That no greater tolerance shall be allowed in case of bottles or similar containers which, because of their design, can not be made of approximate uniform capacity than is allowed in case of bottles or similar containers which can be manufactured so as to be of approximate uniform capacity.

(3) Discrepancies in weight or measure, due exclusively to differences in atmospheric conditions in various places, and which unavoidably result from the ordinary and customary exposure of the packages to evaporation or to the absorption of water.

Discrepancies under classes (1) and (2) of this paragraph shall be as often above as below the marked quantity. The reasonableness of discrepancies under class (3) of this paragraph will be determined on the facts in each case.

(j) A package containing two avoirdupois ounces of food or less is "small" and shall be exempt from marking in terms of weight.

(k) A package containing one fluid ounce of food or less is "small" and shall be exempt from marking in terms of measure.

(l) When a package is not required by paragraph (g) to be marked in terms of either weight or measure, and the units of food therein are six or less, it shall, for the purpose of this regulation, be deemed "small" and shall be exempt from marking in terms of numerical count.

F. I. D. 155 (May 29, 1914).¹

CHANGING EFFECTIVE DATE OF FOOD INSPECTION DECISION NO. 153, WHICH AMENDS REGULATION 9, RELATING TO GUARANTIES BY WHOLESALERS, JOBBER, MANUFACTURERS, AND OTHER PARTIES RESIDING IN THE UNITED STATES TO PROTECT DEALERS FROM PROSECUTION.

The effective date of Food Inspection Decision No. 153, issued May 5, 1914, is hereby postponed until May 1, 1916: *Provided*, That as to products packed and labeled prior to May 1, 1916, in accordance with law and with the regulations in force prior to May 5, 1914, it shall become effective November 1, 1916: *And provided further*, That compliance with the terms of regulation 9 of the Rules and Regulations for the Enforcement of the Food and Drugs Act as amended by Food Inspection Decision No. 153 will be permitted at any time after the date of this decision.

¹ Signed by the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce.

DECISIONS OF COURTS.

UNITED STATES v. HARPER.

(Police court, District of Columbia, March 12, 1908.)

Notice of Judgment No. 25.¹

A drug product labeled "Harper's Cuforhedake Brane-Fude * * *" *held* misbranded on account of false and misleading statements borne on the label and inclosed in the package.

Information alleging violation of sections 1 and 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

[2]² IVORY G. KIMBALL, *Judge* (charge to the jury). I want to congratulate you upon your arrival at the last stage of this very long, but very interesting and important case. As was stated by Mr. Baker, the United States district attorney, it is the first case under the pure food [3] law in any court in the country, and it is one that may, in its final results, test many questions that are raised by the law and necessary to its proper administration, which questions must be finally settled by the courts.

The act known as the pure food law was passed on the 30th of June, 1906, but did not go into effect, as far as this case is concerned, until the 1st of January, 1907, thus giving to manufacturers a chance of changing their labels and packages, if they found it necessary to do so, and giving opportunity to dealers to get rid of any drug that might come under the purview of the law. So that in this case, as you have noticed in the prayers, the date is given to you as from January 1, 1907, up to the date of the filing of this information.

The information as originally filed had four counts, but the Government has abandoned the second and third; and, therefore, in your deliberations you will take no account of the second and third counts, but will confine yourselves to the first and fourth.

The first count relates to the manufacture of a misbranded drug; the fourth count relates to the sale of such a misbranded drug.

There was no law on this subject before the passage of this act. So that up to the 1st day of January, 1907, this drug might have been legally branded as the Government claims it was branded after that date; but from the 1st day of January, 1907, the law of June 30, 1906, went into effect, and is effective upon all manufacturers coming within its purview.

The first section of this information charges that the defendant, Robert N. Harper, manufactured a drug which was misbranded; and to fully inform you as to what is meant by the law by "misbranded," I will state what the law requires, because the law uses the word

¹ Notices of Judgment will hereinafter be referred to by the initial letters, N. J.

² Numbers in brackets refer to pages in Notice of Judgment.

"misbranding" and then defines it, and the court and jury are bound by the definition of misbranding as laid down in the law. The term applies to all drugs or articles of food, or articles which enter into the composition of food, "the package or label of which shall bear any statement, design, or device regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular."

You will notice how broad the law is in its definition. If it is found from the evidence that in any particular this drug known as "Harper's Cuforhedake" misstates or states falsely, then the law has been violated. It is not necessary that each one and all of them have been broken, but the law says "in any particular." So that if you find from the evidence that in any one point there has been a misbranding under the definition which I have read to you then you shall find a verdict of guilty.

I might say here that there are several items in this first count which, before entering upon the trial, Mr. Baker, on behalf of the Government, abandoned. So, in considering this, you will only take into account the items that I shall name, they being the only items on account of which Mr. Baker says the law was violated.

The first claim that he made is that said drug was not a cure for headache, nor a food for the brain, and I want to read in that connection, because the words "Cure" and "Brain Food" have been referred to by each one of the counsel who has appeared before you, the prayer that I have granted as to the meaning of those words:

The jury are instructed that in determining the meaning of the words "brain-food," "cure," "poisonous," and "harmless," the definition of which has been called into question by this inquiry, they are to give such words their ordinary and customary meaning as understood by the general public and not a technical meaning as given by any expert witness.

This law was passed not to protect experts especially, not to protect scientific men who know the meaning and the value of drugs, but for the purpose of protecting ordinary citizens, like the jury and like counsel and others, who have learned during the hearing of this trial a great deal more about these things than they ever knew before in all their life.

[4] In determining the meaning of the words used upon these cartons, bottles, and circulars, they are to be taken in the way that an ordinary, plain, common citizen, without scientific knowledge, would understand them if they were put before him.

And so with regard to this "Cuforhedake," you can take it to mean what an ordinary man would take it to mean—the meaning which it conveys to an ordinary person when he gets a remedy said to be a cure for headache. The first prayer as presented to me on the part of the Government touches that subject. I do not know that it is necessary for me to read it to you again. It has been read three times. If that word, spelled in the two different ways that it is spelled, would convey to the ordinary citizen the idea that it was a food for the brain as contradistinguished from the idea of a food for the whole body, then it is—and I so charge you in this first prayer—misleading, and therefore a violation of the law; and if you find that such a definition is what the ordinary citizen would apply to it, then you, under that first prayer, would be compelled to bring in a verdict of guilty, and you have the right, in considering that question, to

take it in the connection in which it is placed. You have the right to consider that it is on a medicine which it is claimed is a cure for headache, an ache which is supposed by most citizens to be from the brain, and the words brain food spelled in the two different ways you have had demonstrated to you so many times are used in connection with a cure which is said to cure the headache—an ache that is seated in the head. You have a right to consider all that. How would an ordinary citizen, in taking that up and seeing these words, understand it? What would he understand by the use of those words?

I have granted some other prayers where the subject of brain food is referred to.

Mr. BAKER. If your Honor please, when you read the other ones, will you spell out the words?

The COURT. The jury are further instructed that if they find from the evidence that the use by the defendant of the name "branfude" as a part of the name of the defendant's preparation was not reasonably or fairly calculated to deceive or lead to the belief that the preparation was a food for the brain, then they shall find that the use by the defendant of the word "branfude" was not false or misleading. That is the question that I suggested to you a moment ago. How would the ordinary citizen, upon reading that, understand it? If it would mislead him or have a tendency to mislead him, then the case is made out. If there is nothing in the term in the way in which it is used that would mislead an ordinary citizen, then, of course, that, under the prayers that I have granted, is to be taken into consideration by you.

Mr. BAKER. Would your Honor read that first prayer now?

The COURT. I will read, at the request of counsel, the first prayer:

If the jury find from the evidence beyond a reasonable doubt (and you gentlemen are old jurors and understand perfectly well what is meant by a reasonable doubt. I need not again charge you on that point, because you have had that charge over and over again. The doubt must be a reasonable one—one that a reasonable man would entertain from the evidence), that the defendant Robert N. Harper, on the fifth day of August, 1907, or at any time between the first day of January, 1907, and the date of the filing of this information, in the District of Columbia, did manufacture a certain liquid medicine or preparation, styled and designated "Harper's Cuforhedake Brain Food," or "Harper's Cuforhedake Brane Fude," and did place on the bottle, box, or circular thereof the following statements, designs, and devices, or any of them, viz, "Cuforhedake Brain Food" or "Cuforhedake Brane Fude," unless you further find from the evidence that there is a known and distinct kind of food that feeds and nourishes the brain as distinguished from a food that feeds and nourishes the whole body; and that the said drug or preparation is a food, and that it feeds and nourishes the brain particularly, as distinguished from a food that nourishes all parts of the body, then the jury are instructed as a matter of law that the words [5] "Brain Food" and "Brane Fude"—if you find that "Brane Fude" means brain food—are false and misleading, and your verdict shall be guilty on the first count of the information; and if the jury further find that the defendant did sell or offer for sale to the said Stone & Poole, on the date or within the time mentioned and in the District of Columbia, the said drug in this prayer described, they shall find the defendant guilty on the fourth count of the information.

The next objection that is made in this information is "nor did said drug contain any poisonous ingredients of any kinds."

Gentlemen, the question raised is not whether it is a poison in the doses prescribed in the preparation. That is not the question before you as jurors. You have nothing to do with the question of whether it is poisonous in the doses prescribed or in larger doses. The sole

question raised here for you to consider is whether the said drug contains poisonous ingredients of any kind. If you find from the evidence, beyond a reasonable doubt, that it did contain poisonous ingredients, whether taken in the doses named, whether they would or would not be harmful—if you find that the drug contained a poisonous ingredient—then your verdict must be guilty, because that is the plain issue. Of course, that you must find beyond a reasonable doubt.

The next point is: "Nor was said drug a harmless relief." I do not need to say anything in particular upon that point. That has been fully argued by counsel, and I can not go into the evidence. It is a question for you. Of course, if you find, beyond a reasonable doubt, any one of these points against the defendant, then your verdict must be guilty, whatever you may do with the others, because the law provides "in any particular." Now, I will say nothing further with regard to the "harmless relief" than to refer you to the evidence, which is in your own minds. I can not tell you what the evidence is. You have the right to carefully consider it, and it is your duty to carefully consider all the evidence bearing upon the point, and to determine beyond a reasonable doubt whether, in your judgment as jurors, the case has been made out by the Government beyond that reasonable doubt. If it has been made out that it is a harmful relief and not a harmless one, then of course your verdict must be guilty. If you do not so find upon that point, your verdict would be in favor of the defendant upon that point.

The next one is: "Nor did each ounce of said drug contain 30 per cent of alcohol." I do not think I need to say anything upon that point. The evidence you know. You know the evidence of the two who analyzed it, and you know what they said. I will merely read the prayer that was granted on that subject.

If the jury shall find from the evidence that the defendant's preparation in question contained 30 per cent of alcohol at the time of the manufacture and sale thereof, then they should find that he did not make a false or misleading statement as to the quantity or proportion of alcohol contained therein.

In this prayer the jury are instructed that under the law the defendant had the right to use in the manufacture of preparations common alcohol, which is considered to be a little more than 5 per cent water and a little more than 94 per cent pure alcohol; that is to say, alcohol composed of 94.9 per cent pure alcohol and 5.1 per cent water; and in determining whether the statements on his carton and label regarding the quantity or proportion of alcohol contained in his preparation were either true or false, the jury shall consider that 5.1 per cent of the alcohol he used, if they shall find he used common alcohol, was composed of water.

I think that those two prayers contain all that I need say upon that question. You understand the evidence.

There is one other prayer on the subject of alcohol. I will read that:

If the jury shall find from the evidence that the statement on the carton and label of the defendant's preparation concerning the quantity or proportion of the [6] alcohol contained in such preparation was a true statement of the maximum or the average quantity or proportion of the alcohol contained in his preparation, such statement was in conformity with the law, and his carton and label was not misbranded so far as such statement was concerned.

These three prayers cover all that is necessary for me to say on that point.

I will read the other prayers granted, first taking up prayer No. 2 for the Government:

The jury are instructed as matter of law that if they find from the evidence beyond a reasonable doubt that the defendant, Robert N. Harper, on the fifth day of August, 1907, or at any time between the first day of January, 1907, and the filing of this information, in the District of Columbia, did manufacture a certain liquid medicine or preparation, styled and designated "Harper's Cuforhedake Brain Food" or "Harper's Cuforhedake Brane Fude," and did on the bottle, box, or circular thereof place the following statements, designs, and devices, or any one of them, "Cuforhedake Brane Fude," or "Cuforhedake Brain Food," "that said drug contained no poisonous ingredients of any kind;" "that said drug was a harmless relief;" "that each ounce of said drug contained 30 per cent of alcohol;" and if the jury find beyond a reasonable doubt that the word "Cuforhedake" means cure for headache, and that the said drug is not a cure for headache, or that said drug contains poisonous ingredients of any kind, or that said drug was not a harmless relief, or that each ounce of said drug did not contain as the maximum quantity 30 per cent of alcohol, or that all or any of said statements were in any way false or misleading, then they shall find the defendant guilty as charged in the first count of the information; and if they further find that the said defendant, Harper, did sell and offer for sale, on the day and days aforesaid, the said drug to Frank T. Stone and S. Stuart Poole, then they shall find the defendant guilty on the fourth count of said information.

The fourth count, I believe, is a charge of selling. One charge is for making in the District of Columbia, and the other charge is for selling a misbranded article in the District of Columbia. The two are to be considered separately. If you believe that he sold a misbranded article then you will bring a verdict on the fourth count. If you believe that he misbranded in any of the ways claimed by the Government, beyond a reasonable doubt, then you shall bring in a verdict of guilty on the first count.

There is one other prayer for the Government:

A false statement within the meaning of the act of June 30, 1906, is any statement that is untrue, erroneous, not strictly in accordance with fact, or calculated in any way to deceive; a misleading statement within the meaning of said act is any statement that may in any way tend to lead a person wrongly, or misguide, or lead astray or into error, or cause to mistake, or delude or deceive; and if the jury find that any of the statements charged as false or misleading in respect to said drug, from any point of view, or from any aspect considered, may in any way reasonably be considered untrue, or not strictly in accordance with fact, or calculated in any way to deceive, or lead into error, or cause to mistake or be deceived, then the jury should find that such statement or statements are false or misleading, and that said drug is misbranded.

In considering the expert testimony, a prayer was prepared, which was also read, but I will read it again:

The jury are instructed that the evidence of the expert witnesses who have testified in this case is to be received and treated by them precisely as other testimony. The weight to be given to it by the jury is to be determined by the character, the capacity, the skill and experience, the opportunities for observation, and the state of mind of the experts themselves, as seen and heard and estimated by the jury, by the nature of the case, and all its developed facts.

[7] In other words, I charge you, in substance, that in testing the evidence of experts you have the right to consider whether they have shown sufficient knowledge, and to consider their conduct upon the witness stand, everything about them that has occurred in your sight, and everything that they have given upon the witness stand, for

you are the ones to determine the weight to be given to the testimony of experts or those who come to testify as experts.

The law presumes that a person charged with a crime is innocent until he is proved by competent evidence to be guilty. To the benefit of this presumption the defendant is entitled, and this presumption stands as his sufficient protection, unless it has been removed by evidence proving his guilt beyond a reasonable doubt. That, you gentlemen understand, has been charged you over and over again. The right of a defendant in a court of law in this country is that he stands before you as innocent until he is proven by competent evidence guilty beyond a reasonable doubt.

Here is another prayer granted for the defense:

The jury are instructed that under the act under which this information is filed the defendant is not required to state on the label or package containing the preparation in question any of the ingredients contained therein except the quantities or proportions of acetanilid and alcohol.

Whilst that is true, yet the statement upon the label of the proportion of those two ingredients, if there are other statements upon the carton or label, or other document a part of the carton, which are false and misleading, the fact of the statement of the two drugs would not take away the character of the misleading statements. For instance, the ordinary purchaser of such drugs at a drug store does not know the value or the effect of these several drugs, and if there is put upon the outside of the package the quantity of this drug, and at the same time a statement that there are no harmful ingredients in it, or no poisonous ingredients in it, the fact that the label would show that there was a poisonous or harmful ingredient in it, if such were the fact, would not remove the liability to a penalty under this law, because it is the ordinary purchaser that we are dealing with. The ordinary purchaser does not know, except in some few instances of well-known poisons, the nature of the various ingredients going into drugs. If there is that which is false or misleading upon any part of that which is sold accompanying the drug, he would be liable under the provisions of this act.

Here is a prayer granted to the defense which is somewhat on that line:

The jury are instructed that the purpose of the act of June 30, 1906, was to prevent the public from being deceived or misled in the purchase of drugs, and that the defendant can not be found guilty of misbranding his preparation unless on the label, bottle, or package of his drug he made any false statements or such statements concerning the same as would naturally and reasonably deceive or mislead or tend to deceive or mislead.

The jury are further instructed that in order to convict the defendant in this case of the offenses charged in the information, or either of them, they must believe and find beyond a reasonable doubt that all or some one of the alleged false or misleading statements are or is false or misleading in some particular.

Another prayer:

The jury are instructed that the burden of proof in this case is upon the prosecution, and before they can find the defendant guilty the evidence adduced must satisfy them beyond a reasonable doubt that the statements contained on the label or package of the defendant's preparation or the printed matter connected therewith or some one or more of said statements was or were false or is misleading.

That covers all the prayers.

Gentlemen, in considering this case, you do not want to take into consideration the position or standing of the defendant. Everyone that appears before the bar of this [8] Court stands on an equal plane, as far as the verdict of the jury is concerned. We are not trying Mr. Harper, the president of the American National Bank, or Mr. Harper, the president of the Chamber of Commerce; but we are trying here Robert N. Harper, a citizen of the District, and you gentlemen are sworn to try the case, standing between the defendant on one side and the United States on the other.

You have nothing to do with the question, as counsel have told you, of the penalty. You are here to determine the plain questions of fact that are presented.

If you find any one of the charges brought by the Government in the first count against Mr. Harper, although you may find him not guilty on all the others, any one of them would be sufficient and would require you to bring in your verdict of guilty, because if he is guilty beyond a reasonable doubt upon any one of the charges of false or misleading statements coming under the word "misbranded," then he is guilty, because the law requires that when a man puts out to the general public a drug he shall put on that no statement, he shall put on that no label which is false or misleading in any particular. If you find that this has been done, that there is a false or misleading statement in any particular upon this preparation put out by Mr. Harper, then your verdict must be "Guilty."

If, however, you find that in no one of the points named has Mr. Harper made a statement which is false or misleading, then, of course, your verdict would be in favor of Mr. Harper and would be "Not guilty."

If you find him guilty upon the first count and find that he sold this article to the firm of Stone & Poole, then you would find him, in that connection, guilty on the fourth count. If, however, you find him not guilty on the first count, you must necessarily find him not guilty on the fourth count.

MR. TUCKER. Has your Honor concluded?

THE COURT. Yes; unless there is something that counsel wants me to say further.

MR. TUCKER. What I want to say is this: Under the rule established by the Court of Appeals, where instructions are repeated in the charge of the court, it is necessary for the parties to reserve their exceptions again to the prayers, repeating their exceptions. I accordingly except, for the reasons I have stated, to the granting of each and every of the prayers granted on behalf of the prosecution, and to the refusal of the court to grant each and every of the prayers presented on behalf of the defense and refused, and to the modification of the court to such of the defendant's prayers as have been modified by the court; all on the grounds I have stated.

THE COURT. There was only one, I think.

MR. TUCKER. Only one, I think. I simply put it in the plural to cover any possibility.

I also object and reserve an exception to the language of the court in the charge relating to the subject of dosage, and in instructing the jury, in effect, that they should disregard the dosage as prescribed on the label of the defendant's bottle.

I also object and except to such part of the charge as stated to the jury that the ordinary purchaser does not know the nature of the ingredients in drugs, as a rule, on the ground that that is a matter for determination by the jury.

The COURT. Gentlemen, take the case.

Motions by the defendant in arrest of judgment and for a new trial were severally made and overruled, and notice was given of appeal to the Court of Appeals of the District of Columbia. Subsequently the appeal was withdrawn.

SAVAGE v. SCOVELL.¹

(Circuit Court, E. D. Kentucky, July 16, 1908.)

171 Fed. 566.

Statute of the State of Kentucky (Laws 1906, p. 282, c. 48) *held* not unconstitutional as being in conflict with the Food and Drugs Act, June 30, 1906 (34 Stat., 768). It is valid as an inspection law, and not in conflict with the provisions of the said act of Congress.

In Equity. On motion for preliminary injunction and demurrers to the bill. Demurrers overruled.

COCHRAN, *District Judge*. This cause has been submitted on motion for a preliminary injunction and demurrers, special and general to the bill.

It is claimed by plaintiff that he is entitled to the relief he seeks because the article manufactured and sold by him is not covered by the Kentucky act involved herein. Laws 1906, p. 282, c. 48. He maintains that said act covers only that which is a food, and said article is not a food, but a medicine. I think the distinction between what is a "food" and what is a "medicine" is clear, and there can be no question that said act covers the former, and not the latter. A "condiment" is a food, and not a medicine. It is therefore covered by the act, and that by express terms, but the act is not prevented from covering that [567]² which is a food because it is a medicine also. Conceivably an article may be a food and a medicine both, and that when used in the same way, i. e., when taken internally. Such an article is covered by the act notwithstanding its medicinal quality.

I have considered the evidence carefully and have reached the conclusion that the article of plaintiff's manufacture is a food—probably it is better to say that it is a condiment—and that such is the effect of his representations and claims in regard thereto. Undoubtedly he claims it to be a medicine also, and it may be said that the stress of his claims lies here; but in a real sense it must be said to be at least a "condimental food," and hence that it is covered by the act. Plaintiff is in no position to complain of his article being treated as what he calls it. The evidence shows that his action in naming it a food was not purely arbitrary, but based on reality.

The act itself is not unconstitutional. It is an inspection law, and the States have the right to pass inspection laws. This is expressly

¹ Not arising under the Food and Drugs Act, June 30, 1906.

² Numbers in brackets refer to pages of Federal Reporter.

recognized in the second clause, section 10, article 1, of the Federal Constitution; but, this apart, a State has power to enact inspection laws, even though it affects interstate commerce, at least in the absence of congressional legislation making a difference in the situation. This is on the ground that Congress by its nonaction has impliedly consented to the enactment thereof, i. e., Congress, instead of regulating interstate commerce in such particular directly, does so through the State legislature enacting the law. At the time of the passage of the Kentucky act and its going into force, the Federal pure food law (act June 30, 1906, c. 3915, 34 Stat., 768 [U. S. Comp. St. Supp. 1907, p. 928]) had not been enacted.

The position that the act is valid as an inspection law finds direct support in the case of *Patapsco Guano Co. v. Board of Agriculture*, 171 U. S. 351, 18 Sup. Ct. 862, 43 L. Ed. 191. The case of *Bowman v. Chicago & N. W. R. Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700, is not to the contrary. The law involved there was not an inspection law.

It is claimed that said act is unconstitutional, in that it authorizes the director of the agricultural experiment station to take as much feeding stuff as he might desire, provided he confined himself to 2 pounds from every package. I do not think that such is the meaning of this provision of the act. An inspection law can properly provide the taking of so much of an article covered by it as is necessary for analysis in order to determine its true nature. This is just as proper as a fee for the inspection. The meaning of this act is that said director may take as much, not as he desires, but as much as is necessary for analysis; but in no event shall it exceed 2 pounds. It was not intended that the director should have the right to take 2 pounds in every instance out of every package, whether necessary to make an analysis or not. It is not alleged that in the execution of the law defendant has taken, or intends to take, more from the packages containing plaintiff's article than is necessary to make an analysis.

Again, it is urged that said act has been done away with by the Federal law before referred to. It is questionable whether Congress can affect a State inspection law simply by legislation covering the same [568] subject—whether in order to do so it must not enact legislation under clause 2, section 10, article 1, of the Federal Constitution, expressly revising and controlling same. But, this apart, the two laws do not cover the same territory. The Federal law simply covers the subject of adulteration and misbranding. The State law has nothing to do with either. It has to do with the subject of disclosing the ingredients of the articles covered by it. Its policy is to compel a statement of ingredients so that purchasers thereof in Kentucky may know exactly what they are buying. There may be no adulteration or misbranding, i. e., no violation of the Federal law, and yet there may be a violation of the State law in not disclosing ingredients.

It follows therefore that the motion for a preliminary injunction must be denied.

Inasmuch as the bill alleges that plaintiff's article is a medicine, and not a food or condiment, and hence not covered by the act, the bill sets forth a good cause of action, unless defendant's point that this is a suit against the State of Kentucky, and hence within the

prohibition of the eleventh amendment, is well taken. I do not think that this point is well taken. This is not a suit against the State, but against M. A. Scovell. If the plaintiff's article is not a food, but a medicine, as alleged in the bill, then said defendant has no right to set on foot prosecutions against plaintiff and dealers in his article under said act, and he owes plaintiff a duty not to do so, and plaintiff is entitled to have this duty performed. I have covered this whole subject in a paper read before the Kentucky State Bar Association, on July 8, 1908, at Louisville, to which I refer as setting forth fully my views on it. It took considerable time to prepare this paper, and this accounts somewhat for my delay in disposing of this case. The subject was in so much confusion that I could not handle a case successfully involving the question of maintainability of suits against the executive officers of a State without a thorough investigation on my own part covering the whole ground.

The demurrers to the bill are overruled.

If parties agree, the cause can be submitted on bill, answer, and affidavits, as was done in the case of *Allegheny Oil Co. v. Snyder*, 106 Fed. 764, 45 C. C. A. 604. If so, a decree will be entered dismissing plaintiff's bill at his costs. Of course, the temporary restraining order granted herein ceases as of this date to be of any force.

UNITED STATES v. 100 CASES OF TEPEE APPLES ET AL.

(District Court, W. D. Missouri, October 23, 1908.)

179 Fed. 985; N. J. No. 36.

Apples and blackberries labeled "Tepee Apples (or Blackberries) Packed by C. H. Godfrey & Son, Benton Harbor and Watervliet, Michigan," which were shown by the evidence to have been grown in Arkansas, *held* misbranded, because the labels indicated that the fruits were grown in Michigan.

Libel under section 10 of the Food and Drugs Act.

C. H. Godfrey & Son intervened as claimants and excepted to the sufficiency of the libel on the grounds that the act was unconstitutional and because no preliminary hearing as provided by section 4 of the act had been accorded the claimants by the Secretary of Agriculture. These exceptions were overruled by the court. Jury was waived and the case tried to the court on an agreed statement of facts and deposition of C. H. Godfrey. Decree of condemnation and forfeiture.

[1986]¹ SMITH MCPHERSON, *District Judge*. This case is by information filed by the United States attorney, charging that Ridenour-Baker Grocery Company, of Kansas City, Missouri, has in its possession cases of apples and blackberries in original unbroken packages which are misbranded within the meaning of the act of Congress approved June 30, 1906, entitled "Food and Drugs."

The fruits were thereupon seized by the marshal, and notice thereof given. In due time C. H. Godfrey & Son, of Benton Harbor, Michigan, appeared and made defense. A jury was waived and the case tried to the court. The evidence consists of an agreed statement of facts and the deposition of C. H. Godfrey. And these are the facts:

¹ Numbers in brackets refer to pages of Federal Reporter.

Godfrey & Son pack and can fruits, with their factory at Benton Harbor, Michigan, and such has been their business for several years, with their principal office at that place, the fruits grown there, as well as in other States. Their only post office address was there.

The apples and berries in suit were grown at and near Springdale, Arkansas, and by Godfrey & Son there bought and canned, and by them later on sold and shipped to the Ridenour-Baker Company at Kansas City. Each can of apples was labeled with a blue paper about ten inches long and five inches wide, with a picture of a red apple, an Indian tent, or "tepee," with the words "Tepee Apples; Packed by C. H. Godfrey & Son, Benton Harbor and Watervliet, Mich."

The berry cans had the same label in all respects, except the picture was of a cluster of blackberries and the words "Tepee Blackberries."

The opinion of the Secretary of Agriculture was that such words to the exclusion of Springdale, Arkansas, where the fruit was grown and packed, mislead the public. Evidence is offered that Godfrey & Son did not know of such opinion, and that they believed the cans were properly labeled. Such evidence is not admissible and is ruled out.

The evidence shows that Michigan and northern apples are of a better quality and flavor than are Arkansas apples, and that is a matter of common information. As to the berries, the evidence is not [987] so certain, although the deposition of Mr. Godfrey fairly shows that Michigan blackberries, with one variety excepted, are better than those of Arkansas.

Adulteration of goods and false labeling had become so common that it was well-nigh impossible to purchase pure goods, or that which was called for. The same was true as to medicines. Congress undertook to remedy it. The one purpose was to prevent the sale of adulterations. The other purpose was to enable a purchaser to obtain what he called for and was willing to pay for. And under this latter view it is immaterial whether Michigan fruits are better than those grown in Arkansas. A purchaser of canned goods may prefer Michigan fruits. He may believe them to be better than Arkansas fruits. He has the right to call for them, and when he pays or is debited for them he has the right to have Michigan fruits. The purchaser has the right to determine for himself which he will buy and which he will receive and which he will eat. The vendor can not determine that for the purchaser. He, of course, can make his arguments, but they should be fair and honest arguments.

In this case the label is very attractive to the eye, and of course its only purpose is to sell the fruit. But for that the label would not be on the can. That is what the purchaser at retail looks for, and that is what, more than any other statement or argument, induces the purchase. That the evidence shows that to be misleading, because the words thereon, "Packed by C. H. Godfrey & Son, Benton Harbor and Watervliet, Mich.." is understood by all adults and children as not only being there packed, but fruits grown in that vicinity. Of course it is idle to insist, as Mr. Godfrey does, that the fruits could not have been raised *within* the city of Benton Harbor. The term "misbranded" as used in the statute, as defined by the statute, is

"the package or label of which shall bear any statement, design, or device regarding such article * * * which shall be false or misleading *in any particular*, and to any food which is falsely branded as to the State, Territory, or country in which it is *manufactured or produced*."

Again, the statute recites, "If it be labeled or branded so as to deceive or mislead the purchaser, it should be considered as misbranded."

There can be no doubt, as it seems to me, that any purchaser from this label would be deceived, in that he would be receiving Arkansas fruits instead of Michigan fruits. Deception is seldom practiced by a literal falsehood, but is usually joined with some truth, so that the entire statement will deceive. And so in this case. Of course the statement is true that Godfrey & Son reside and do business at Benton Harbor; but that one true statement is used in conjunction with the packing of the fruits, and I repeat that I would believe from that, as would all others, that it is Michigan fruit within the cans. And if Godfrey & Son believe, and if it be true, that Arkansas fruits are as good or better than Michigan fruits, let that fact be disclosed by labels and otherwise. This statute is to protect consumers and not producers. It is a most beneficent and righteous statute, and within the powers of Congress to legislate concerning, and should be enforced. It can not be [988] enforced if it is to be emasculated, as is sought in the present case. The order will be that the fruits and cans under seizure will be sold by the marshal after being properly branded. This will be done, instead of destroying them, as the fruits are not deleterious.

But this order may be avoided under the statute if Godfrey & Son will pay the costs and give bond to properly brand the goods in accordance with this opinion, and sell them in all respects in conformity to law.

UNITED STATES v. 50 BARRELS OF WHISKY.

(District Court, D. Maryland, October 26, 1908.)

165 Fed., 966; N. J. No. 68; Circular No. 10, Office of the Solicitor.

A product made in Louisiana from a cheap grade of New Orleans molasses (commonly known as "blackstrap"), sulphuric acid, and water, labeled "Bourbon Whisky," held misbranded.

Libel under section 10 of the Food and Drugs Act. On exception to libel, and charge to jury. Exception overruled. Libel sustained.

STATEMENT OF FACTS.

[967]¹ This was a libel filed by the United States seeking the condemnation of 50 barrels, more or less, of alleged whisky. The libel charged that the product had been distilled at New Orleans, La., out of molasses, and had been there branded "Bourbon Whisky;" that such branding was a misbranding, in that whisky was a distillate of grain, Bourbon whisky a distillate of fermented mash of a mixture of grains—of which mixture corn constituted the larger part—and that

¹ Numbers in brackets refer to pages of Federal Reporter.

to entitle the product to be called Bourbon whisky it must be distilled in certain localities, particularly in the State of Kentucky, and not in Louisiana. There was no allegation in the libel that there had been any hearing before the Secretary of Agriculture, as prescribed in sections 4 and 5 of Food and Drugs Act, June 30, 1906, c. 3915, 34 Stat. 769 (U. S. Comp. St. Supp. 1907, pp. 929, 930). The claimants excepted to the sufficiency of the libel because of the absence of this allegation.

MORRIS, *District Judge*. (Overruling exception to libel.) In this case, which is a libel for the seizure and forfeiture of 50 barrels of distilled spirits alleged to be misbranded contrary to the provisions of the act of Congress of June 30, 1906, the libel does not allege that there had been any preliminary examination such as is provided for by section 4 of the act.

The claimant has excepted to the libel upon the ground that the court has no jurisdiction unless such a preliminary examination has preceded the seizure.

It is urged that the harshness of the proceeding in seizing goods alleged to be misbranded without giving the owner the opportunity of being heard as to their true nature is such that the court should if possible construe the law so as to require the examination as a prerequisite to seizure. Such seizures are not unusual, and it is plain that if the harshness were conceded, it would not justify the court in reading into the law a limitation which it does not contain. The act provides two different proceedings to enforce the provisions. One is by a criminal proceeding in personam; the other is by a proceeding in rem, by seizure of the offending thing itself, and forfeiture if found to be in violation of the law. In this latter case there is no provision for a preliminary examination. Section 10 of the act provides that any article of food, drugs, or liquor that is adulterated or misbranded, which is being transported from one State to another, shall be liable to be proceeded against and seized for confiscation by process of libel for condemnation. It is further provided that the proceedings of such libel cases shall conform as near as may be to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case. The libel alleges that fifty barrels of distilled liquor are now at a named place within the district, having been transported from the city of New Orleans, in Louisiana, to Baltimore, Maryland, branded "Bourbon Whisky," which brand indicates a liquor containing all the congeneric substances obtained by distillation from a fermented mixture of grain, of which Indian corn forms the chief part, and confined to whisky distilled in the State of Kentucky, and that the fifty barrels of distilled liquor in question, branded Bourbon Whisky, [968] are not whisky at all but a distillate of molasses distilled in New Orleans, La. The libel then prays that the fifty barrels of liquor may be proceeded against and seized for condemnation, in accordance with the act of Congress approved June 30, 1906, and prays the court to order process of attachment in due process of law, and that all persons having or pretending to have any right, title, or claim in said liquor may be cited to appear and answer the premises. This is according to the course of proceeding in libels in admiralty, and in similar proceedings in rem for forfeitures for violation of the internal revenue laws.

Such seizures are made in cases in which forfeiture of the goods is the penalty, without preliminary examination or proceedings of any kind, in cases of violation of the customs laws and the shipping regulations, as well as violations of the internal revenue laws.

The exception is overruled.

At the trial it was proved, and not denied, that the spirits libeled had been distilled in New Orleans, La.; that the material from which they had been distilled was the cheaper grade of New Orleans molasses (commonly known as "Blackstrap"); that to each 350 gallons of molasses was added about 1 gallon of sulphuric acid; and that this mixture was further diluted by the addition of $5\frac{1}{2}$ gallons of water to every gallon of molasses.

The libellant produced some 50 or more witnesses, being distillers of rye and Bourbon whiskies, retail liquor dealers, retail grocers, druggists, the chairman of the revision committee of the United States Pharmacopœia, physicians, chemists, and food experts, who testified that in their understanding the word "whisky" imported a distillate of grain; that the words "Bourbon Whisky" imported a distillate of mixed grains, of which mixture Indian corn constituted the larger part. Most of these witnesses were further of the opinion that the phrase "Bourbon Whisky" implied that the whisky had been distilled in Kentucky. All the chemical witnesses, on both sides, testified that in the present state of chemical knowledge it is not possible by chemical analysis, alone, certainly to tell whether a given product is brandy from grapes, whisky from grain, or rum from molasses.

The claimant proved that its distillery had always been surveyed and registered as a sweet-mash molasses distillery; that during the six years immediately preceding the seizure, 12,000 barrels of its product were branded and entered as "Bourbon Whisky," and that, out of said 12,000 barrels, 9,000, of which the 50 barrels, more or less, seized were a part, had been withdrawn and sold to various persons as Bourbon whisky; that the said barrels so entered and withdrawn were reported by the claimant and the government storekeeper at the distillery to the collector of the district, by him reported to the Commissioner of Internal Revenue, and by the latter reported in his printed annual reports as entries and withdrawals of Bourbon whisky; that the branding of the words "Bourbon Whisky" had been put on each of the said barrels by the United States gauger in charge of such distillery. The claimant offered the annual reports of the Commissioner of Internal Revenue for the years from 1901 to 1907, inclusive, to prove that during most of these years there had been only one distillery in Louisiana, and that was the claimant's molasses distillery; that no material other than molasses was used for distillation in that district, and that these reports did not show that any rum had been distilled in the district of Louisiana. The claimant further offered said reports to show that for many years next preceding the seizure the records of the Internal Revenue Department purport to show that Bourbon whisky had been produced in some 10 states other than in Kentucky. These reports, in this respect, show that more than 90 per cent of all the whisky branded "Bourbon Whisky" produced in this country was produced in Kentucky, and that the larger part of the small percentage not produced

in Kentucky was produced in States immediately bordering on Kentucky. The claimant further offered chemical evidence to the effect that whenever starch, malted cereal, cane sugar, or grape sugar are subjected to the ordinary processes [969] preliminary to fermentation a common sugar is derived from them. So that, while there are chemical differences in the mash, depending on the material out of which the mash is made, a large part of such mash in each case consists of a sugar common to all. The claimant further offered chemical testimony to the effect that the character and kind and race of the yeast used in fermentation has an important effect upon secondary products and upon the flavor of the finished product; that a large part of the distinction in the aroma between American whiskies on the one hand, and Scotch and Irish whiskies on the other, is due to the circumstance that American whiskies are aged in charred barrels; that such improvement in the flavor of whisky in charred packages as takes place after the fourth year is due largely to concentration, and the oily appearance of matured whisky is due to material extracted from the charred packages, and that the body of whisky, so called, is due largely to the solids extracted from the wood. The claimant further offered evidence to the effect that sulphuric acid is used to invert the sucrose, so that fermentation can be accelerated, and ammonia is used as a yeast food; that there were no poisonous or deleterious substances in the whisky seized, and that chemical analysis showed that no sulphuric acid or ammonia remained in the whisky seized, those substances having been eliminated in the process of distillation.

The libelant proved in rebuttal that the gauger who branded the barrels in this case "Bourbon Whisky" received his information that the contents of the barrels were Bourbon whisky from the distiller, and that many gaugers in the service in other districts had habitually acted upon such information in determining what was the name, known to the trade, by which each package of distilled spirits should be branded. The Government further proved that once a month the distiller made a sworn return of the quantities and kinds of spirits distilled by him, giving to each class of them the name by which he asserted they were known in the trade, and further proved an internal revenue regulation which provides that, as to the kind of spirits produced, the gauger should see that his returns agreed with those made by the distiller, and that the tables in the annual reports of the Internal Revenue Department read in evidence by the respondents were simply compilations of these distillers' monthly reports. The government offered evidence of a chemical expert, who has made a special study of fermentation and distillation, to the effect that it is not necessary to use sulphuric acid in distilling molasses for the purpose of accelerating fermentation; that he had made accurate experiments to determine whether the addition of sulphuric acid to the mash would increase the rate of fermentation, and the result of the experiment was to show that the addition of sulphuric acid made no difference either in the rate at which the sugar was inverted, as determined by examinations with the polariscope, or in the rate at which the sugar was fermented, as determined by the study of the rate at which the specific gravity of the liquid diminished; that there may at times be a very good reason for the use of sulphuric acid, and

that is to check the multiplication of foreign ferments or acetic acid bacteria. A good many different antiseptic materials have been used for such purposes. Of these sulphuric acid is one, and it is also about the cheapest, and about as readily obtained as any.

Another way of preventing the existence of these false ferments is to keep the distillery clean.

The libellant offered three prayers and the respondent one prayer, which latter was as follows:

The Louisiana Distillery Company, the claimant in this case, prays the court to instruct the jury that a portion of the product of its distillery, including therein the 50 barrels, more or less, seized in these proceedings, having been branded by the United States gauger, from time to time, during the seven years preceding the seizure herein, as "Bourbon Whisky," and having during that period been as "Bourbon Whisky" entered in bond in the United States bonded warehouses of said claimant, the entries thereof reported as "Bourbon Whisky" to the internal revenue collector in the district of Louisiana, and having been reported as "Bourbon Whisky" to the Commissioner of Internal Revenue, and portions thereof, as shown by the evidence in the case, having been withdrawn from said bonded warehouses as Bourbon [70] Whisky" and the said withdrawals having been reported as "Bourbon Whisky" to said collector, and by him reported to the Commissioner of Internal Revenue as "Bourbon Whisky," and the taxes on all said withdrawals having been paid to the United States Government, and the said Commissioner of Internal Revenue having full knowledge during all this time that the said distillery was surveyed as a sweet-mash molasses distillery, and that molasses and not grain was used therein for the distillation of spirits, and that the product thereof was during said period of seven years branded "Bourbon Whisky," and that the entries and withdrawals therefore were as "Bourbon Whisky" and the taxes thereon paid as such, then the libellant is estopped from claiming that the contents of the said 50 barrels of whisky, more or less, were or are other than "Bourbon Whisky," and their verdict must be for the Louisiana Distillery Company.

MORRIS, *District Judge* (charge to the jury). I will not call upon counsel for the United States to reply. The case as it is presented to the jury is a very clear one. I reject the only prayer offered by the defense. Really, that prayer concedes the misbranding of the liquor, and asks me to say to the jury that if they shall find that this was done under the control and by the agents of the United States, the United States, which is the plaintiff in this case, is estopped from proceeding to condemn these goods and forfeit the goods for misbranding. That proposition I reject. Every one who deals with agents of the United States deals with them with the knowledge imputed to him of the restriction upon their authority. It seems to me it can not be successfully contended that any agent of the United States has authority to do a thing which is forbidden by law; and it is forbidden by this law passed in 1906, the pure food law, to misbrand any goods which are intended to be or are actually transported from one State to another. Of course the gentlemen of the jury would know, or should know, that the United States has no authority, under the Constitution of the United States, to regulate the sale of goods within the limits of a State. It is only when they are transported from one State to another, and become a part of interstate commerce of the country, that the United States has the authority to pass laws regulating them. So this liquor, without infraction of any law so far as I know, might have been offered for sale and sold in Louisiana, unless there is some law of Louisiana which prohibits the misbranding of or misrepresentation with regard to the constituents of an article that is offered for sale. It is only, therefore, when these

goods become a part of the interstate commerce of the country that this pure food law of 1906 applies to them, that "misbranding" shall apply to the placing on the package of any statement which shall be false or misleading in any particular, and provides that any article misbranded, which is transported from one State to another for sale, is liable to confiscation. Therefore I do not think that anything that was done in the distillery in Louisiana, in New Orleans, in any way estops the United States or estops the authorities, or the agents of the United States in Maryland, from proceeding to condemn these goods upon the ground that they were misbranded. It would be destructive of the enforcement of many of the laws of the United States if the act of any agent of the United States could be set up as a defense [971] against the explicit law; the explicit law in this case being that any goods that are misbranded shall be forfeited. If any gauger, at the request of a distiller or under a generally understood practice of the distillery, should misbrand an article of distilled liquor, it would be utterly subversive of the law, if the act of the gauger could be a defense to the positive enactment of the act of 1906 which forbids misbranding goods that are to be transported from one State to another. I, therefore, reject that contention on behalf of the claimant of the goods in this case.

The real issue which the jury are to determine is whether these goods are whisky as known to the trade and to the community generally, and to those who deal in whisky. If it is not whisky, the case is made out in favor of the United States. If the jury believes—and there is a great deal of testimony to that effect—that the word "whisky" is applied only to a distillate made of grain, that is an end of the defense in this case. If they so find, their verdict must be for the United States, because it is admitted in this case, and it is not a question of dispute, that this liquor is not made from grain, but is a distillate of molasses with a slight infusion of sulphuric acid.

But the jury might possibly find that it could be called "whisky." Then there is a second question, can it be called "Bourbon Whisky"? There is a great deal of testimony to show that Bourbon Whisky, in its most general sense, is a whisky made from grain of which corn is the larger constituent. If you find that this was not such a whisky, then it is not Bourbon whisky, and your verdict must be for the United States. Then there is testimony also to the effect that Bourbon whisky, as understood in the trade, is confined to a whisky made in Kentucky. If you find that to be the fact—and that is for you, entirely, on the testimony—if you find that in the trade, and among those who deal in and who are familiar with the article, Bourbon whisky implies that it is made in Kentucky, then of course that is an end of the case so far as the claimant is concerned, because it is admitted that this liquor was made in New Orleans.

I might say that a good deal has been said about the hardship and injustice of condemning an article which once has been branded by the gauger, but I do not think that that appeals very strongly to any one's sense of morality, because a gauger is not a man who is to decide what is the trade-name of an article. He takes that largely from the distiller. He is not a dealer in liquor, nor is he a man of science who is to determine once for all, and incontrovertibly, whether it is what it is branded or something else.

I will now give you the instructions asked for by counsel for the United States. The first prayer is as follows:

The jury are instructed that if from the evidence they shall find that the word "whisky," as understood by scientific men, the liquor trade, and by the public generally, is confined to a distillate of grain, and shall further find that the contents of the barrels libeled in this case are a distillate of molasses, and that the said barrels were branded "Bourbon Whisky," then the said barrels were misbranded, and their verdict must be for the libelant.

[972] The second prayer has reference to the restricted meaning of "Bourbon Whisky," as applying to whisky distilled in the State of Kentucky. It is as follows:

The jury are instructed that if they shall find from the evidence in this case that the phrase "Bourbon Whisky," as defined in the standard works of reference in use in this country, and as understood by scientific men, the liquor trade, and by the public generally, imports a liquor distilled in the State of Kentucky, and shall further find that the contents of the barrels libeled in this case were distilled at New Orleans, in the State of Louisiana, and shall further find that the said barrels were branded "Bourbon Whisky," then the barrels are misbranded, and their verdict must be for the libelant.

The third prayer has reference to what you may find from the evidence is the more general acceptance of the words "Bourbon Whisky," in case you find that the words do not necessarily require that it shall be made in Kentucky. The instruction is as follows:

The jury are instructed that if they shall find from the evidence that the phrase "Bourbon Whisky," as understood by scientific men, the liquor trade, and the public generally, is confined to a distillate of grain made from the mixture of fermented grain, of which mixture corn constituted the greater part, and shall find that the contents of the barrels libeled in this case are a distillate of molasses, and shall further find that the said barrels are branded "Bourbon Whisky," then the said barrels are misbranded, and their verdict must be for the libelant.

I do not think there is anything further that I need say to the jury, except to remind you that there is no dispute at all as to the material out of which this distillate was made. The whole case, in my judgment, and I so instruct you, turns upon whether the general acceptance of the word "whisky" means that it is made from grain. Of course, this liquor was not so made.

Further, in regard to Bourbon whiskey, if the term "Bourbon Whisky" implies that the article was made of corn in greater part—not made of molasses, but made of grain of which corn was the greater part—then, of course, it was misbranded.

So, further, if you find that Bourbon whisky is confined to whisky made in Kentucky, and of grain, and that the larger constituent part must be corn, then, of course, this would not be Bourbon whisky, because it was not so made.

As to what the testimony has proved to your satisfaction are the proper meanings, accepted by the trade and by scientific men, of "whisky" and "Bourbon Whisky," those are facts to be found by you from the testimony, which I leave entirely to you. It is my duty to instruct you upon the law, and to leave the facts to be found by you.

The jury returned a verdict "for the libelant," and on December 19, 1908, the court decreed the condemnation of the product.

UNITED STATES v. SCANLON.

(District Court, N. D. Ohio, E. D., November 27 1908.)

180 Fed. 485; N. J. No. 47.

Syrup, manufactured from cane sugar, flavored with an extract from the wood of the maple tree after it had been chopped down, labeled "Western Reserve Ohio Blended Maple Syrup," and in smaller type, "This syrup is made from the sugar maple tree and cane sugar," *held* misbranded.

Information charging misbranding under Food and Drugs Act; Jury waived. Tried by the court. Convicted.

TAYLER, *District Judge* (orally). A cursory examination of this label—that is the only examination that the ordinary customer makes, and that is the examination which is controlling in a case of this [486]¹ kind—presents the suggestion, if it does not carry with it the absolute statement, that this bottle contains Ohio maple syrup; but a careful scrutiny discloses, between the red words "Ohio" above and "Maple Syrup" below, a blue word "Blended," and then, below that, in smaller type, the statement that "This syrup is made from the sugar maple tree and cane sugar."

I think it was intended to convey the impression that there was a mixture, in the popular meaning of a mixture, of maple syrup and of a syrup which is made from cane sugar or New Orleans molasses or something of that kind, that people prefer to use rather than the heavier or thicker kinds of syrup; a kind of appropriate union of syrups that are used for a common purpose. At all events, the information conveyed by this label as one looks at it is that it is primarily a maple syrup, and then, upon a little closer inspection, that it is not exactly all maple syrup but that it has some syrup in it made from cane sugar. The label was evidently designed to go as far as it could in advertising the fact that maple syrup was there and still to comply with the pure food act.

Now, it would be very interesting to enter into this discussion, not exactly sophistical, but still drawing rather sharp lines of distinction between various conceptions of the meaning of the law and the chemical aspects of these various products of the maple tree; but I do not think it is necessary for me to go into it. It is not so much a question of chemistry as of popular comprehension. We would not have any pure food laws if we were all chemists, because then we would be able to find out for ourselves what the thing was we were buying; and, of course, the opportunity and suggestion of temptation to deception would be very much reduced if a man who sold knew that he was dealing with a person who could find out easily just what he was buying. It is not a question of chemistry in this case, any more than it is with butter. It is a question of what is the popularly recognized definition of maple syrup; and that undoubtedly is, and we do not need the chemists to testify to it, that it is the syrup produced from boiling down the sap that flows in the spring of the year from the live maple tree. It has a certain consistency, and, of course, a certain specific gravity, which a chemist can tell us about; but those persons who have used it know in a general way when it has a proper consistency and a

¹ Numbers in brackets refer to pages of Federal Reporter.

proper specific gravity, as they certainly do whether it has the proper flavor.

So that, if this syrup is made, as Mr. Scanlon says it is made, by some treatment of the chopped-down maple tree, whereby he gets an enormously larger amount of what may be called maple saccharine than is obtained from the free flowing of sap from the live tree, that is not maple syrup which he gets from it. If his statement is true—and I have no right to question its truth, except that I can hardly believe him when he says he obtains so much—that he gets his maple syrup and maple sugar that way, that is not maple sugar which he makes, and, therefore, he is not permitted to make use of that word [487] under the pure food act. It seems to me that is all there is in this matter for me to consider now.

It is an interesting question whether this is not a “blend.” But I do not pass upon that. I pass upon the broad question and lay down the broad proposition that this label is misleading and is a violation of the law; that the contents of the bottle are not what the label manifestly and suggestively declares those contents to be; and, primarily, I think the fundamental fact is that it is not maple syrup. The people who buy maple syrup would be in a very different frame of mind if they knew that the so-called maple syrup that made this so-called maple blend was derived from a treatment of the wood of the maple tree after it was chopped down from that in which they are when they buy what they understand to be maple syrup made from the boiled-down sap drawn from the live tree. So I will have to find the defendant guilty.

UNITED STATES v. GRIEBLER.

(District Court, E. D. Illinois, November 30, 1908.)

N. J. No. 37.

Milk containing added water *held* adulterated.

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

[2] WRIGHT, *District Judge* (charge to the jury). Gentlemen of the jury: In this case the Government charges the defendant that he shipped and delivered for shipment from Trenton, in the county of Clinton, in the State of Illinois, to Carlyle Dairy Company, at St. Louis, in the State of Missouri, an article of food, to wit, a certain quantity of milk which was then and there adulterated by having mixed and packed therewith water so as to reduce and lower and injuriously affect the quality and strength of said milk, contrary to the statute, etc.

There are two counts in this information, but it isn't necessary to specifically call your attention to more than one, because, as I understand the prosecution, they are not claiming that the statute was violated but the one time.

The act of Congress makes it unlawful for a person to ship an article of food from one State to another State, or to deliver such article for shipment from one State to another State, which, at the time of the delivery, or shipment, was, or had been, adulterated. The adulteration to be contrary to the statute must be, first, if any sub-

stance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength; second, if any substance has been substituted wholly, or in part, for the article.

Before the Government can claim a conviction at your hands it must be proved by the evidence in the case beyond a reasonable doubt that the defendant is guilty as charged in the information. If, after a fair and impartial investigation, you have a reasonable doubt of his guilt, as charged in the information, then it would be your duty to acquit him. If, after the same investigation of all the evidence in the case, you have an abiding conviction of his guilt, then it would be your duty to convict him.

A reasonable doubt is not such a doubt as is engendered by imagination, or by an undue sensibility of the consequences of your verdict. Nor can you go outside of the evidence. A doubt must arise from a fair and impartial consideration of the evidence, and it is such a doubt as if interposed in the graver transactions of life it would cause a reasonable man to pause before acting upon it. Now, if you have such a doubt of the guilt of the defendant in this case as I have endeavored to define, you will acquit him. If you have an abiding conviction of the truth of this charge, then you will convict.

The real issue in this case is whether, under the evidence here, the milk, at the time it was shipped, or delivered for shipment, contained water. That is the charge in the information. It is not necessary for the Government to prove that the defendant actually put the water in himself, nor is it necessary to prove that he knew at that time there was water in the milk, if there was water in it. Under this statute, for the protection of the public, those who consume, a person who undertakes to ship food products must be held to know what it is he puts into commerce, must know at his own peril what it contains. It is sufficient if you believe he delivered the milk for shipment, or shipped it, and that there was water in it, and that the water was mixed therewith so as to reduce or lower or injuriously affect its quality or strength, and as to that question you know as much as any witness. It is not a matter for an expert. It is a matter of everyday knowledge as to whether water in the milk would reduce or lower its strength. Everybody knows that it does. So if you believe from the evidence that there was water in the milk you will convict the defendant. If you find there was no water in it you will acquit him.

UNITED STATES v. 650 CASES OF TOMATO CATSUP.

(District Court, D. Rhode Island, January 21, 1909.)

166 Fed. 773.

Where a libel for the condemnation of tomato catsup charged misbranding in that the label recited that the catsup was made from choice ripe tomatoes, when in fact it was made in part from tomato pulp screened from peelings and cores, as the *offal* of tomato canning factories, *held* that, the libel being confessed, the burden was on the Government to prove that the label contained a statement which was substantially false and misleading. Case allowed to stand for ex parte hearing of proof in support of the libel.

[774] BROWN, *District Judge*. This libel prays condemnation of 650 cases of tomato catsup, under act Cong. June 30, 1906, c. 3915,

34 Stat. 768 (U. S. Comp. St. Supp. 1907, p. 928), known as the "pure food law." The charge is of misbranding.

The only material part of the label is the following:

Made from choice ripe tomatoes, granulated sugar, selected high grade spices, grain vinegar.

The libel alleges that the articles are misbranded—

For the reason that said catsup is made in part from tomato pulp screened from peelings and cores, as the offal of tomato canning factories, and not from choice ripe tomatoes, granulated sugar, and selected high grade spices, grain vinegar, as stated in said labels.

It is not charged that there is a violation of section 7, paragraph 6, which relates to preparations—"consisting in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance," etc.

The sole allegation is that the label is in the above particulars misleading and false.

The words "as the offal of tomato canning factories" are not of exact signification. They do not charge a violation of section 7, paragraph 6. The indefinite suggestion of the word "offal" cannot be considered as the equivalent of a charge that the tomato pulp was a filthy, decomposed, or putrid vegetable substance. The inconsistency, if there be any, must be between the statement that the catsup is "made from choice ripe tomatoes" and the fact that it is "made in part from tomato pulp, screened from peelings and cores."

[775] The act in question imposes criminal penalties and the forfeiture of the offending article. Where the charge is of misbranding, it is essential that the libel should set forth the branding and facts inconsistent therewith. If there is indefiniteness in the statement, this indefiniteness must be removed by proof.

The mere fact that certain portions of the tomato are not used in a tomato canning factory does not establish the fact that they are not suitable for the making of tomato catsup. In order to decide that the libel states on its face a case of misbranding, the court would be required to rule that tomato pulp, screened from peelings and cores, is not made from choice ripe tomatoes.

Among the processes of catsup making which may be considered to be within judicial notice is the process of screening or sifting. The tomato is usually reduced to pulp, and that pulp made from peelings and cores is substantially different from the pulp of choice ripe tomatoes, in catsup making, cannot be inferred from a mere interpretation of the language of the libel. It is especially necessary, in administering an act like the pure food law (however beneficial it may be), that there should be reasonable definiteness and accuracy, not only in the statement of offenses against the act, but in conceptions of what is within the intent of Congress and what is not within that intent. In the administration of such an act it is particularly essential that it should not be given forced or strained constructions.

Though the claimant has not answered or contested the allegations of the libel, so that it may be taken *pro confesso*, yet it is the duty of the court, before entering a decree of condemnation in spite of such confession by default, to see that a case is made out.

The pure food act provides that proceedings for condemnation shall conform as near as may be to the proceedings in admiralty. By the twenty-ninth admiralty rule, upon the taking of a libel pro confesso, "the court shall proceed to hear the cause ex parte and adjudge therein as to law and justice shall appertain." The rule stated in *Thomson v. Wooster*, 114 U. S. 104-111, 5 Sup. Ct. 788, 792, 29 L. Ed. 105, seems applicable to this proceeding:

The bill, when confessed by the default of the defendant, is taken to be true in all matters alleged with sufficient certainty; but in respect to matters not alleged with due certainty, or subjects which from their nature and the course of the court require an examination of details, the obligation to furnish proofs rests on the complainant.

Ohio Central Railroad Co. v. Central Trust Co., 133 U. S. 83-90, 10 Sup. Ct. 235, 237, 33 L. Ed. 561, also contains language appropriate to proceedings upon default in condemnation proceedings:

A decree pro confesso is not a decree as of course according to the prayer of the bill, nor merely such as the complainant chooses to take it; but it is made (or should be made) by the court, according to what is proper to be decreed upon the statements of the bill assumed to be true. If the allegations are distinct and positive, they may be taken as true without proof; but if they are indefinite, or the demand of the complainant is in its nature uncertain, the requisite certainty must be afforded by proof.

The counsel for the claimant protests that nothing putrid or unwholesome is contained in the catsup. He states that defendant's position [776] is substantially that of one pleading *nolo contendere*, and that it prefers to throw up all claim to the goods rather than to contest the matter further. This, however, amounts to nothing more than a concession that what is alleged in the libel is true, with a protest against any objectionable significance in the word "offal."

I consider it to be the duty of the court, before condemning property, to see that there is a proper basis for such condemnation; and this duty is not changed by the concession of the defendant that it would rather its property should be condemned than that it should be put to the expense of contesting the matter with the Government.

I am of the opinion that it is incumbent upon the United States to produce evidence to support the allegation that these goods are misbranded, in that the label contains a substantially false and misleading statement.

Where, upon the facts alleged, there can be no doubt of the substantial and necessary inconsistency between the statements of the label and the actual facts, the court may proceed at once to enter a decree of condemnation upon defendant's concession by default of the facts alleged, without requiring of the Government further proof. The present case, however, is not of that class, but requires further examination of details to determine whether the charge of misbranding is true.

The case may stand for ex parte hearing of proof in support of the libel.¹

¹ On Mar. 15, 1909, a decree of condemnation and forfeiture was entered by the court.

IN RE WILSON.

(Circuit Court, D. Rhode Island, March 8, 1909.)

168 Fed., 566.

Syrup composed of maple sugar 10 per cent and white sugar 90 per cent put up in bottles bearing labels containing the name "Gold Leaf Syrup," with a trade-mark consisting of a gold leaf in the form of a maple leaf and stalks of sugar cane, and the words "composed of maple and white sugar" in plain and distinct letters, with the name of the maker, *held* not misbranded.

On motion for leave to file an information. Denied.

BROWN, *District Judge*. The attorney for the United States moves for leave to file an information alleging violation of the Food and Drugs Act, June 30, 1906, in accordance with the practice followed in *United States v. Smith* (C. C.), 40 Fed. 755.

[567] It is conceded that it is proper for the court to examine the information and the affidavits in support thereof, and if the same shall be found insufficient to deny the motion.

The information charges that a certain company shipped, by a carrier, from the state of Rhode Island to the District of Columbia, a certain article of food in bottles, to wit, syrup, bearing a certain label upon which was printed the following words: "Gold Leaf Syrup, composed of Maple and White Sugar; Huntington Maple Syrup and Sugar Company, Providence, R. I."—and that the label bore also, in the center thereof, the design and representation of the leaf of the maple tree, as the trade-mark of said company. It is alleged that the syrup was misbranded, and that—

the design and device and said printed matter were false and misleading and calculated to deceive and mislead the purchaser thereof, in that said article of food was in fact composed principally of white sugar, and contained no substantial quantity, but, on the contrary, a very small quantity, of maple sugar, to wit, not more than 10 per centum by weight of maple sugar; whereas, said design and device, and said printed matter upon said label as aforesaid, represent, and are calculated to lead the purchaser thereof to believe, that said article of food is composed principally or in substantial part of maple sugar.

Appended to the motion is an affidavit in support of the information by an analyst of the Bureau of Chemistry to the effect that as a result of an analysis of the syrup it was found to contain approximately 90 per cent of white sugar and not more than 10 per cent of maple sugar.

A sample of the bottle is also presented, with a label printed in gold, blue, and red, which at the top has in plain large letters the words "Gold Leaf" in gold, "Syrup" in red, with a blue circular underscoring, a trade-mark consisting of a gold leaf, said to be a maple leaf, with stalks projecting on each side, apparently representing sugar cane, with the name of the company in smaller letters in the middle; the words "composed of" in white on a blue field, being very distinct, and the words "maple and white sugar" in blue on a white field at the bottom, being also very distinct. The very conspicuous features are the words "Gold Leaf Syrup," "Composed of," and "Maple and White Sugar."

It is impossible, upon the most partial interpretation of these statements, and having in mind the decisions of the courts concerning what

amounts to fraudulent misrepresentation upon labels, to find any intimation as to the proportions of maple and white sugar contained in this preparation, which is given the general title of "Gold Leaf Syrup." The purchaser is informed in the most distinct and unequivocal manner that he is buying a compound of maple and white sugar, and from the report of the analyst it appears that this is the fact. There is no statement contained on the label which is in the slightest degree calculated to convey the impression that there is more maple than white sugar, and, if a purchaser should suppose that there was, such an idea would come entirely from his own imagination, and not from any suggestion fairly implied by the label. The label affords not the slightest evidence of an intention to convey such an idea to the purchaser.

[568] Such remote possibilities of the imagination cannot be a basis for a proper interpretation by the courts of terms of clear and unambiguous meaning. The label says nothing of proportions, either directly or by any reasonable implication.

As to the maple sugar, it appears as a fact that 10 per centum is contained in the avowed compound. The article is designed for table use. The addition of so substantial an amount of maple sugar as 10 per cent, if sufficient to give to this compound syrup a maple flavor, serves to make the article more palatable and to satisfy the purpose of the buyer. A person who should buy this syrup would expect that he was getting a considerable portion of white sugar, with the addition of a sufficient amount of maple sugar to please his palate. Unless his palate is disappointed by the absence of the flavor which he expects, I am unable to imagine how there can be any variance between the contents of this bottle and the statements on the label. Even if we search this label with a most prejudiced eye, and endeavor to discover upon it some innuendo or insinuation, we are at great difficulty in finding even the most remote suggestion. Is there an innuendo that there is more maple than white sugar in the composition? Clearly not. Is there an innuendo that there is more than 10 per cent of maple sugar? Viewing this in the light of the subject-matter, to wit, the purpose of the purchaser and the expectations aroused in him as a consequence of statements on the label, I am unable to perceive any more definite suggestion than that there is imparted to the Gold Leaf Syrup a desirable quality due to the presence of maple sugar.

In order to convict a person of misbranding upon such a showing of fact, the court would be obliged to go entirely beyond all the established legal principles upon the question of deceit and misrepresentation, and beyond any of the decisions of the equity courts as to what is abhorrent to the conscience of a chancellor. In fact, I think that we should be obliged to go, not only outside the boundaries of legal and equitable rules, but also outside the boundaries of rational common sense.

From examination of former cases dealing with the subject of misleading representations on labels, I am impressed with the great value of the legislation known as the "pure food act" (act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1907, p. 928]); but I am further impressed with the fact that an attempt to apply that act to cases of this character cannot but serve to bring that act

into such disfavor as to impair its usefulness. The distinction between the enforcement of law and the abuse of law is lost sight of in the attempt to make this obviously innocent act a criminal misdemeanor.

The motion for leave to file the information is denied.

UNITED STATES v. ORIENTAL DRAGÉE COMPANY.

(District Court, D. New Jersey, April 10, 1909.)

N. J. No. 176.

An article of confectionery coated with metallic silver *held* adulterated within the meaning of the Food and Drugs Act, section 7, in that it contained a mineral substance.¹

Information charging violation of section 2 of the Food and Drugs Act. On demurrer to the information. Overruled. Jury trial. Verdict of guilty.

[3] CROSS, *District Judge* (overruling demurrer to information). Omitting the formal parts, the information alleges that the defendant, a corporation of New Jersey, and carrying on business at Jersey City, within said State, on July 31, 1907, at Jersey City, aforesaid, and within the jurisdiction of this court, did wilfully and unlawfully deliver for shipment, and ship and caused to be transported in interstate commerce from the State of New Jersey to the State of New York, an article of food which was adulterated within the meaning of the act of Congress, entitled, "An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, or liquors, and for regulating the traffic therein, and for other purposes," approved June 30, 1906, in that the said defendant on the day and year aforesaid, and within the jurisdiction of this court, did ship from Jersey City in the State of New Jersey, and did cause to be delivered to E. W. Dunstan Company, in the City of New York, in the State of New York, a large quantity, to wit, 25 boxes of Argente Moyens Assortis or Silver Dragees, which said Argente Moyens Assortis or Silver Dragees was an article of food, that is to say, was confectionery and was adulterated within the meaning of the act aforesaid, in that being confectionery as aforesaid, the same contained a mineral substance, to wit, 48 [hundredths] per centum of metallic silver, and in that the said confectionery known as "Silver Dragees" was coated with silver, being a mineral substance and which formed a constituent part of the said confectionery; the said defendant then and there well knowing that the said confectionery was an article of food and was so adulterated. Then follow the usual formal statements. As will have been observed, the information is founded upon what is popularly known as the "pure food act" (34 Stat. 768; Comp. Stat. Supp., 1907, p. 928). The material parts of the act pertinent to the present controversy, will be found in section 7, and are as follows:—"That for the purposes of this act an article shall be deemed to be adulterated: * * * In the case of

¹ Contra, *French Silver Dragée Co. v. United States* (C. C. A.), p. 276, *post*.

confectionery: If it contain terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound or narcotic drug." The defendant has demurred to the information, claiming, among other things, that silver, with which the confectionery in this case is alleged to have been adulterated, is not a mineral substance of like character, with those specifically mentioned in the act; that the information does not allege that the adulterant, to wit, silver, is an ingredient deleterious or detrimental to health, or that the strength and purity of the confectionery falls below the professed quality or standard under which it is sold. As I construe the section in question so far as it relates to the confectionery, it contains five classes of prohibited articles; the introduction of any designated ingredient of either of which violates the act; that is to say, the act would be violated if the confectionery contained terra alba, barytes, talc, chrome yellow or other mineral substance, or if it contained any poisonous color or flavor, or if it contained any other ingredient deleterious or detrimental to health; or if it contained any vinous, malt or spirituous liquor or compound thereof, or lastly, if it contained any narcotic drug. If the construction suggested is correct, then it was unnecessary that the pleader should aver that silver, the mineral substance alleged to have been introduced in this case, was "deleterious or detrimental to health." Those words are limited to the term "ingredient," they qualify that word only, and not any pre[4]ceding word or words. If a comma had been interposed after the word "ingredient," the construction would perhaps have been different. The introduction into confectionery of mineral substances, is, in my judgment, therefore prohibited irrespective of the presence or absence of any poisonous, deleterious or detrimental quality; they are prohibited because they are adulterants, and for that reason only. Coloring or flavoring matter however, may be introduced provided it is not poisonous, but any other ingredient, although not theretofore specified or classified, which is deleterious or detrimental to health, is prohibited. Certain specified articles are, by the first clause quoted, inferentially denominated minerals, and their use is prohibited; then to the specific mineral substances whose use is thus prohibited, is added "or any other mineral substance." The information in brief, alleges that confectionery was shipped by the defendant and delivered in interstate commerce; that such confectionery was adulterated by having in it as one of its constituent parts silver, which is alleged to be a mineral substance. Assuming, because it is admitted by the demurrer, that silver is a mineral substance, its introduction into confectionery as an ingredient, which is also admitted, brought the confectionery within the prohibition of the statute, once it was shipped in interstate commerce. It is urged, however, that silver is not of the class of the specified mineral substances, whose use is prohibited. It must be borne in mind nevertheless, that we are considering an act which relates to the adulteration of food products of which confectionery is one. Silver is a mineral incapable of assimilation through the stomach. It will not yield to the processes of digestion. One of the main purposes of the act is to prevent the introduction of such substances into food products. The title of the act embraces adulterated foods as completely as it embraces misbranded foods, or

poisonous foods, or deleterious foods. It refers to each class separately and in the alternative, and the act deals with each class. Technical rules of construction must give way to the avowed purpose and intention of an act. If it be that an act admits of more than one construction, then that one will be adopted, which best serves to carry out the purpose of the act. Hence I do not feel warranted in permitting the doctrine of *ejusdem generis* or other technical rule of construction to limit the scope of the act. If silver may be used, as claimed, to beautify the confectionery, why not lead to give it weight. The language under consideration is clear and does not require for its construction, the application of technical rules. To yield to the construction of defendant's counsel would open the door for the emasculation of the act.

As to the contention that it was necessary to allege that by the use of silver the strength and purity of the confectionery fell below the professed quality or strength under which it was sold; it is only necessary to say that that clause of the act applies to drugs and to drugs only. It is found in the paragraph dealing with drugs and precedes that which relates to confectionery, which in turn precedes the clause relating to food. Each paragraph is dealt with separately. The clause referred to can not be read into that part of the act which relates to confectionery. It is no part of it.

The demurrer will be overruled.

UNITED STATES v. 300 CASES MAPLEINE.

(District Court, N. D. Illinois, April 30, 1909.)

N. J. No. 163.

An article labeled "Mapleine" which contained no product of the maple tree, held misbranded.

Libel under section 10 of the Food and Drugs Act, against 300 cases of Mapleine, alleging that said product was misbranded in that the label "Crescent Mapleine" falsely represented the article to contain a product of the maple tree. Crescent Manufacturing Co. appeared as claimant and filed exceptions to the libel. Exceptions overruled. Jury trial. Verdict for the libelant.

[2] SANBORN, *District Judge* (charge to the jury). This is a civil case, as distinguished from a criminal case, and is called a suit *in rem*. That is, a suit against property, there being in the first instance no defendant, but the owner of the property being allowed to intervene and set up a claim for the property and defend, proceeding just as if such owner were an original defendant in the suit. But it does not become a suit against any person at any stage of the case.

If there was a misbranding under the food and drugs statute, then as soon as the misbranded packages were started on shipment from Seattle to Chicago, they became forfeited to the United States. They might then be seized by the officers of the United States as its own property wherever the boxes might be found, so long as they are either being transported, or after transportation so long as they remain unloaded, unsold, or in the original packages. If, however, the Government waits until the cases are broken open, then it at once

loses all its title and ownership to the goods which it previously had, and then can only proceed under the criminal provision of the Food and Drugs Act by prosecuting any person or any corporation who either ships misbranded goods or receives them, or delivers them in original packages to any other person.

I call to your attention this because counsel have adverted to the fact that the Government might have proceeded against the bottles. The Government had no right to proceed against the bottles, but must proceed only against the original packages, or else prosecute any person who has anything to do with the packages themselves.

Now, as this case is not technically brought against any person or any corporation, but only against the boxes, the fact that the Crescent Manufacturing Company may sustain a loss, if you find the cases were misbranded, or there was any false statement on the label, is not in question, and should not be considered by you in reaching the verdict, but as the case involves a forfeiture [3] of property, that is as the property becomes the property of the Government immediately upon being misbranded and shipped, and as the burden of proof is on the Government to show by the greater weight of the evidence that the label in question is false or misleading to the ordinary purchaser, it is your duty under these circumstances to scrutinize the evidence tending to show that the label was calculated to deceive more carefully than you otherwise would in the ordinary civil case. This is because misbranding is attended with harsh consequences operating, as it does, as a forfeiture of the property, of the ownership of all the articles so misbranded.

Now, in deciding the meaning of the word "Mapleine," you are to give it its ordinary and customary meaning, as understood by the general public, and not any technical meaning given it by any expert witness. You may consider, of course, all the testimony of all the witnesses, expert or otherwise, but the test is what the common run of purchasers would understand by the word. The important question is whether there was or was not a misbranding. You will notice how broad the law is in its definition. If the statement, design or device in question is false, or misleading, not necessarily as a whole, but in any particular, then there was a misbranding, if from the evidence you find that in any one point there was a false or misleading statement on the label, taking into consideration what I shall state hereafter as to the bottles and the cartons, then there should be a verdict of guilty.

The purpose of the law is not to protect experts or scientific men alone who know the nature and value of food products, but to protect ordinary people like you and me—people without scientific knowledge or experience.

Was there a false statement on the label—that is, a statement that was untrue, erroneous, or not strictly according to the fact? Or, was there in the label a misleading statement—one which would in any way tend to lead an ordinary person wrongly, and misguide or lead astray, lead into error, cause to mistake, delude or deceive? If you find the label was either false in any particular, or misleading in any particular, from any point of view, or any aspect which may reasonably be considered false or untrue, or calculated to deceive, mislead, delude, cause to mistake or lead into error or mistake, the ordinary purchaser; then there was a misbranding under the provisions of the

statute. Now, in considering this question of false statement or misbranding, there are certain things which appear in the evidence, which you are not only allowed to take into account, but which you should consider. I may mention them as follows:

Whether purchasers of "Mapleine" bought from the box label alone, or from the box label and the statements on the cartons or wrappers and the bottles. Now, if you find that the "Mapleine" was bought from the labels on the cartons and bottles, then you may consider whether the ordinary purchaser, the average purchaser, would be deceived or misled.

Another question which you should take into account is whether "Mapleine" is known, or was when these boxes were seized, known as an article of food under its own distinctive name—and a distinctive name is either one so arbitrary or fanciful as to clearly distinguish it from all other things, or one which by common use has come to mean a substance clearly distinguishable by the public from everything else. In this connection, you should consider whether the evidence shows that there was no other article in the market or common or general to the public, used as a maple extract or containing maple product. You should also consider if you think that "Mapleine" was bought from the carton or bottle as well as from the words on the box, the size and appearance of the boxes or the cases or bottles, and the labels, the color of "Mapleine" as compared with genuine maple—its taste and smell—the price asked for it, and [4] the directions for its use. Even if you should believe that the word "Mapleine" standing alone would be deceptive and misleading, yet you may consider any statement contained on the carton or bottle which you believe the common run of purchasers would read in making their purchases. If you believe that "Mapleine" has been on the market a sufficient length of time and has been sufficiently advertised so as to have become generally known to the public as an article containing no genuine maple syrup or any maple product, but only to produce a maple flavor, then you should take this into consideration on the question whether the label was or was not deceptive or misleading. You should also consider that the label was registered as a trademark by the Commissioner of Patents of the United States, in connection with the picture of a leaf, as having some bearing on the question whether the word "Mapleine" has become a distinctive name, or is a distinctive name, as I have defined that term to you. You should also remember that "Mapleine" is not injurious to health. Further, if you believe from the evidence that no complaints of mistake or of being deceived or misled have been made by purchasers of "Mapleine," you may consider this as tending to show that the label on the cases, cartons and bottles is not calculated to deceive or mislead. But, it is not necessary, in order that you should render a verdict of guilty, that any person was actually deceived or misled into purchasing "Mapleine" by the label on the cases in question. It is enough if you find that the label is misleading in any particular.

Gentlemen, I stated to you that the Government had the right to seize the boxes, but after the boxes had become opened the Government lost its right to seize the contents of the boxes. I was slightly in error in making that statement, in not going further and stating that while the Government can only seize the original package, yet it may open the package, and if it finds anything wrong on the inside

of the package which does not appear on the outside, that is any misbranding or any false statement, it has just as much right to proceed in a case of this kind upon that false statement or misbranding as it has upon the label on the outside of the package which is seized. But, if it does not seize the original package before it is opened, then it has no right whatever to do anything more than to prosecute any party who may deliver the goods or receive the goods in a criminal case.

Your verdict will be "Guilty" or "Not Guilty," and the verdict will be handed to you by the officer.

Referring to the second page of the charge, the paragraph commencing:

"Now, in deciding the meaning of the word 'Mapleine,' you are to give to it its ordinary and customary meaning."

The instruction given was that in deciding the meaning of the word "Mapleine" you are to give it its ordinary and customary meaning, as understood by the general public, and not any technical meaning given it by any expert witness. You are to consider all the testimony of all the witnesses, expert or otherwise, but the test is what the common run of purchasers would understand by the word. What is there about that that is uncertain or mixed?

The question is what this word "Mapleine" in connection with all the facts and circumstances of this case, means to the common run of purchasers.

You are to consider whether they bought on the box label, or on the label on the cartons and bottles; consider the language on the cartons; and after you have considered all of them, you are then to try and solve the question of misbranding—that is, whether the common run of purchasers would understand by that word that there was or was not any genuine maple in the product.

The question is what would the ordinary purchaser—just the common run of purchasers—in view of the way in which they buy it—language on the box [5] and everything that comes to their attention, looks of the bottle, color of it (if they see it), the fact that the bottle is small, and all other facts that present themselves to the purchaser when they come to buy the goods. What would they understand from the whole situation? Not exactly what the word "Mapleine" standing by itself—but the question is, what it means in connection with all the facts and circumstances that present themselves to the purchaser; how would the purchaser understand it, seeing the bottle, or seeing the box?

Even if you should believe that the word "Mapleine" standing alone, would be deceptive and misleading, yet you may consider any statement contained on the carton or bottle which you believe the common run of purchasers would read in making the purchase.

Now, gentlemen of the jury, in another part of the charge it was stated, the question was stated in this way: Was there a false statement on the label, that is a statement that was untrue, erroneous, or not strictly according to the facts. Or, was there in the label a misleading statement, one which would in any way tend to lead an ordinary person wrongly, or misguide, or lead astray. Now, there were two questions submitted there, and that was taken from the first part of section 8 of the law defining the word, "misbranded."

It says the word misbranded shall apply to all articles of food, the label, the package label, of which shall bear any statement, design or device regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular. Now, in determining what the meaning of this word misbranding was, you are to determine two things: Was the label false in any particular? was it misleading in any particular?

Now, whether or not it was false, depends a good deal, you see, upon whether it would mislead anybody, whether it would deceive anybody, because this term "Mapleine," of course, is a coined word, and is not in the dictionary. You heard the testimony as to what meaning was given it by the Crescent Manufacturing Company, but that is not the test. The test is, what is the general signification of the word, as the ordinary man would understand it? Was it false in any particular, in its true and proper signification? Now, its true and proper signification depends upon what the ordinary man would understand from all the facts and circumstances appearing in the evidence. These two things, while they are separate, are yet connected, because here is a term which starts out without any meaning—I mean any settled or definite, or dictionary meaning. The parties who coin the word give it a meaning, and then they send out the label with the word upon it. Now, the question is: Is there anything false in that word, any suggestion of any falsehood in that word, or any suggestion of anything misleading or deceiving in that word? Now, I think it comes down to the question as to what the people would understand by that word from the whole situation, including all the statements on the label, and anything else the purchaser would naturally see.

Here is a word that starts out without any meaning at all in the dictionary. It may be plain on its face, and may not. If you think this word is plain on its face, of course, you must find the property guilty under the law, but if you think this word is ambiguous on its face, then you may go into the question, what would the ordinary man understand by it, in view of all the facts and circumstances brought to his notice in purchasing the goods? The real purpose of the act is to protect the public against imposition. You may take that into consideration. Now, if nobody is injured, nobody harmed, what difference does it make?

I can see it is a close case, gentlemen, and a difficult question, but you must do the best you can with it.

UNITED STATES v. FRENCH SILVER DRAGÉE CO.

(Circuit Court, S. D. New York, May 19, 1909.)

N. J. No. 249.

A confectionery labeled "Silver Dragées" which was coated with metallic silver *held* adulterated within the meaning of section 7 of the Food and Drugs Act in the case of confectionery, in that it contained a mineral substance.¹

Information charging adulteration under Food and Drugs Act. On demurrer to information. Demurrer overruled. Jury trial. Verdict of guilty.

¹ Reversed, *French Silver Dragée Co. v. United States*, p. 276, *post*.

HOUGH, *District Judge* (overruling demurrer). [2] The brevity of this memorandum does not indicate that in my opinion the question raised by this demurrer is trivial.

On the contrary, it is extremely important and presents (I think) a question of first impression under the pure-food law which will ultimately require either amendment of the act or decision of the highest court.

I incline to the following view:

What is or is not an adulteration in commercial or scientific parlance is wholly unimportant, because section 7 of the act defines adulteration and whether such definition squares with the views of the trade or of scientists is no concern of the courts.

[3] Confectionery is therefore by statute adulterated "if it contains terra alba, barytes, talc (or) chrome yellow." This much is not open to doubt.

Next it seems to me the court may take judicial notice of the nature of the substances declared adulterants by statute. They are all undoubtedly mineral substances;—they are not all poisonous, though all possess color. Nor can it be said that they all possess flavor in the sense of that word as applied by most people to confectionery.

There being no punctuation between the phrase "or other mineral substances" and the phrase "or poisonous color or flavor," the word "other" must be held to apply to "mineral substance" and "poisonous color or flavor." But the enumeration of terra alba et al. gives an illustration (so to speak) of "mineral substances" and of "poisonous color" (i. e. chrome yellow), but so far as I understand the nature of the articles enumerated it does not give an instance of a poisonous *flavor* as distinguished from poisonous color.

Let therefore the rule so insisted upon by the defendant be applied and the act be limited to mineral substances, poisonous colors and poisonous flavors *ejusdem generis* with the articles enumerated;—and it must then follow that while the proscribed poisonous color or flavor must be a mineral substance, it does not follow that every mineral substance to be proscribed must possess either poisonous color or poisonous flavor.

The act is undoubtedly obscure in connecting color and flavor with substance, for strictly speaking neither color nor flavor can have *substance*, nor be *mineral*.

I am therefore inclined to think that this statute must be construed as prohibiting the use in confectionery of all mineral substances of the same nature as those enumerated, and of those enumerated some are well known to be merely inert, possessing no poisonous qualities whatever (e. g. terra alba and talc).

The best that can be said of silver is that it is inert, and it is just as much a mineral substance as is terra alba.

With some doubt I overrule the demurrer.

UNITED STATES v. ST. LOUIS COFFEE & SPICE MILLS.

(District Court, E. D. Missouri, May 22, 1909.)

189 Fed. 191; N. J. No. 301.

An information charging that defendant shipped in interstate commerce a liquid labeled "Flavor of Vanilla," which liquid did not contain any extract of vanilla, *held* not to state a case of adulteration or misbranding of vanilla extract in violation of Food and Drugs Act, the words "extract" and "flavor" not being synonymous terms.¹

Information charging adulteration under section 2 of the Food and Drugs Act. On demurrer to evidence. Demurrer sustained and jury directed to return verdict for defendant.

[192] DYER, *District Judge* (sustaining the demurrer). Since the adjournment of court on yesterday I have considered more fully the demurrer interposed by the defendant's counsel to the case as stated in the two counts of the information and the evidence offered by the Government in support thereof.

This is the first case arising under the act of June 30, 1906 (act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1909, p. 1187]), entitled "An act for preventing the manufacture, sale or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes," that has been presented to this court for determination.

For a violation of this statute penalties are imposed and it is made the duty of the United States attorney, when the Secretary of Agriculture shall report to him any violation of the act to cause appropriate proceedings to be commenced and prosecuted without delay for the enforcement of the penalties, etc.

The Secretary reported this defendant to the district attorney and as a result the information now under consideration was filed in this court.

The proceeding is for a violation of the statute that imposes penalties, and by its terms declares each violation a misdemeanor. The information therefore should be as certain and definite as if the offense were charged in an indictment.

Judging by the well-recognized requirement of pleading in such cases, do the counts or either of them state clearly and with sufficient certainty any offense against the statute under which the proceeding was commenced, and is now [193] prosecuted?

The importance of and the great good to the public that will follow the enforcement of this act, can hardly be measured, and the delay taken by the order of adjournment yesterday was for the purpose of enabling the court to determine (with proper regard to the contention of the district attorney on the one side and of defendant's attorneys on the other) its decision.

The first count in the information charges in substance: "That by Circular No. 19 of the United States Department of Agriculture, dated June 26, 1906, the Secretary established certain standards of purity for food products as authorized by an act of Congress of

¹ See subsequent ruling of the same court in *United States v. Edward Westen Tea & Spice Co.*, p. 222, *post*, in which this question was left to the jury.

March 3, 1903 (act Mar. 3, 1903, c. 1008, 32 Stat. 1158). That said order No. 19 provided that 'Vanilla extract is a flavoring extract prepared from vanilla bean,' etc. The count then states "that in trade and commerce and the science of food chemistry, the words 'vanilla extract' signify an extract prepared from the 'vanilla bean, etc., etc.' and in trade and commerce the words 'vanilla extract' are synonymous with the words 'vanilla flavor' when placed on bottles containing a liquid to be used for flavoring purposes."

The information (after making the foregoing recitals) charges that the defendant on the 26th of October, 1907, unlawfully and knowingly shipped by the Missouri Pacific Railroad from St. Louis, Mo., to Kansas City, for sale in interstate commerce, a certain bottle labeled "*Nectar Choice Flavor of Vanilla*, sugar colored, for flavoring ice cream, etc." That the contents of the bottle were *adulterated* in violation of the act of June, 1906, in that said bottle contained a liquid which did not contain any extract of vanilla, as defined by Circular No. 19, and by the usages of trade and commerce, and was in fact an imitation and substitute therefor, etc.

By the word "adulteration" as used in the act, it is understood to mean "to corrupt, debase, or make impure by an admixture of a foreign or a baser substance." How can it be successfully claimed that because the liquid in the bottle offered in evidence did not contain extract of vanilla that it was therefore adulterated within the meaning of the statute?

The circular No. 19 issued by the Secretary of Agriculture was issued long before the enactment of the statute under which this proceeding is had, and for that reason, if for no other, cannot be considered in determining the question of the guilt or innocence of the defendant in this case.¹

By section 2 of the act of June 30, 1906, it is made an offense to introduce into any State, etc., any food or drugs *adulterated* or *misbranded*.

The first count charges that the bottle sent from St. Louis to Kansas City contained "adulterated liquid extract or flavor." It also charges that the liquid did not contain any extract from the "vanilla bean," but did have a vanilla *flavor*.

The court is now asked to say that "Vanilla Extract" and "Vanilla Flavor" as known to the trade, is one and the same thing, and that in dealing with the defendant in this case "extract" and "flavor" are synonymous in meaning, and that, therefore, if the defendant shipped a liquid which had the flavor [194] of vanilla it was guilty of *adulteration* of the extract of vanilla, within the meaning of the statute.

Neither the Secretary of Agriculture nor the public generally can change the meaning of the words "extract" and "flavor." Without reference to the dictionaries and the definition of the words contained therein, it is known that "extract" is one thing and "flavor" another.

The evidence in this case has failed to convince the court that even among dealers the words "extract" and "flavor" are considered synonymous terms.

¹ See *United States v. Frank et al.*, p. 360, *post*, holding that the Standards of Purity for Food Products (Circular 19) govern in determining what constitutes adulteration under the Food and Drugs Act.

The information charges that there was an adulteration of the article, but fails to state in what particular and how it was adulterated. It states a conclusion without making the necessary averments from which the conclusion could be fairly reached.

Section 7 of the act of June, 1906, provides that an article shall be deemed to be adulterated when:

In case of food:

First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

Second. If any substance has been substituted wholly or in part for the article.

Third. If any valuable constituent of the article has been wholly or in part abstracted.

Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

Fifth. If it contain any added poisonous or other deleterious ingredient which may render such article injurious to health.

The information fails to charge that the article sold and delivered to the grocer in Kansas was mixed or packed in such a manner as to reduce or lower or injuriously affect its quality or strength; nor does it charge that any substance was substituted for the article; nor does it charge that any valuable constituent was abstracted; nor does it charge that the article was colored in a manner whereby inferiority was concealed; nor does it charge that the article contained any added poisonous or other deleterious ingredient that would render it injurious to health.

It would seem that one or more of these things should be specifically charged in the information, and that the charge should be made with such particularity as to fairly inform the defendant of the act of violation complained of, and for which it is to answer.

The conclusion reached by the court is that the first count does not sufficiently charge an offense under the statute, and that the evidence offered by the Government does not aid the defect.

The second count is similar in all respects to the first, as far as the recitals are concerned.

This count seeks to charge "misbranding" under section 8 of the act.

That section is as follows:

SEC. 8. That the term "misbranded" as used herein shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

That for the purposes of this act an article shall also be deemed to be misbranded * * * in case of food:

First. If it be an imitation of or offered for sale under the distinctive name of another article.

Second. If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of any morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any of such substances contained therein.

Third. If in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package.

Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular; provided that any article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word "compound," "imitation," or "blend," as the case may be, is plainly stated on the package in which it is offered for sale; provided that the term "blend" as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only.

[195] It will thus be seen that this count does not follow the words of the statute in charging the offense, but repeats the facts contained in the first count.

The charge in this, as in the first count, should be specific enough to fairly inform the defendant of the charge it is to meet. In my opinion the count is insufficient.

There is nothing left for the court to do on this information but to direct a verdict of not guilty.

UNITED STATES v. 65 CASKS OF LIQUID EXTRACTS.

(District Court, N. D. West Virginia, May 25, 1909.)

170 Fed. 449; N. J. No. 284.

Liquid extracts, contained in casks, shipped in interstate commerce from the manufacturing agent to the owner, for the purpose of bottling and labeling, held not misbranded by reason of the absence of statements on the casks showing the quantity or proportion of alcohol contained therein.¹

Libel under section 10 of the Food and Drugs Act. Jury trial waived. Judgment in favor of claimant. Libel dismissed.

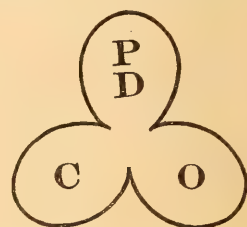
AGREED STATEMENT OF FACTS.

[450] The said Knowlton Danderine Company is a corporation organized under the laws of the State of Illinois, having a warehouse, laboratory, and finishing department in Wheeling, in the State of West Virginia, and is the proprietor of a preparation for the hair which it markets in 3-ounce, 6-ounce, and 12-ounce bottles, under the trade name of "Danderine," the formula of which is a trade secret and comprises liquid extracts and other ingredients. Parke, Davis & Co., who are mentioned in the said libel as shippers, are manufacturing pharmacists at Detroit, in the State of Michigan, and are under contract with the said Knowlton Danderine Company, the respondent in this proceeding, to compound the said formula and to cause the same to be transported and delivered in bulk in carload lots to the respondent at Wheeling, and no sale of the said danderine is made to the public or any outside purchasers until the said casks

¹ Affirmed, *United States v. Knowlton Danderine Co.*, p. 243, *post*.

are emptied and the contents thereof placed in the properly marked bottles. The said casks are made of wood bound with iron hoops, and shipped like barrels, and for the purpose of safe transportation a sufficient number of casks, each holding about 50 gallons, are used, which, when emptied by the respondent, are returned to the said Parke, Davis & Co., to be again refilled and shipped. Each and every one of the 65 casks mentioned in said libel contained a drug product accurately compounded in accordance with said formula, and said drug product contained an average of 10 per centum of alcohol. All of the said casks are marked in the same manner, with the exception that the figures, some of which show the number of gallons contained therein, and others the number of casks, are marked in the same manner when shipped, and are marked wholly upon one end of the cask. Varying as in figures as aforesaid, each cask is marked as follows:

49 1/2
S 46022
63
Wheeling Terminal
19th St. Delivery
Knowlton Danderine Company
Wheeling, W. Va.
505 lbs.



There are no other marks, brands, or labels upon the said casks or any of them, and the casks which are referred to in the said libel were marked in the manner hereinbefore indicated and had no other marks, brands, or labels upon them. When the contents are removed from the said casks they are [451] placed in bottles, and on each bottle is a printed label containing in plain letters the words "Danderine Scalp Tonic, Alcohol 10 per cent."

The said respondent has a spur track running into its building at Wheeling, upon which each car is left as soon after its arrival as possible, and the casks are removed from the car promptly by the respondent, which bottles and labels the contents, which process of bottling and labeling is known as the finishing process, and in pursuance of this custom the respondent had before the seizure of the casks, which was made in this proceeding, emptied 59 of the said 65 casks, and was engaged in bottling and labeling the same, and would have continued so doing until all of the 65 casks were bottled and labeled but for the seizure in this proceeding of the 6 casks, which had not been emptied or bottled, though the last-mentioned 6 casks had been removed from the car in which they had been shipped and received.

The 65 casks mentioned in the said libel were shipped by Parke, Davis & Co. to the respondent by boat to Sandusky, in the State of Ohio, where they were transferred to a car which contained nothing else, and the said last-mentioned car was forthwith transferred from Sandusky, in the State of Ohio, to Wheeling, in the State of West Virginia, and was delivered upon the premises and in the building of the respondent, and was emptied at the time of the seizure of the said 6 casks.

The libel filed in this proceeding is based upon an examination of the samples of the contents of the said casks obtained from the re-

spondent a few days prior to the filing of the said libel by a food and drugs inspector from the Department of Agriculture of the United States. The Secretary of Agriculture did not cause notice to the effect that it appeared from such examination of the said sample that the same was adulterated or misbranded to be given to the respondent as the owner and claimant thereof, or to any one else before the matter was directed to the attention of the district attorney, or before this proceeding was begun and the casks seized by the marshal.

After the United States marshal had seized 6 of the 65 casks of liquid extracts mentioned in the said libel, he permitted a food and drugs inspector of the Department of Agriculture to open one or more of the said casks of liquid extracts and to transfer and remove therefrom about 3 gallons of the contents thereof.

The situation and conditions as shown by the facts herein set forth were substantially the same from the time when the 65 casks involved in this proceeding were originally shipped from Detroit down to and including the present time.

DAYTON, *District Judge* (after stating the facts as above). The defences relied on are: (a) That the Food and Drugs Act (act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1907, p. 928]) does not require a drug product to be labeled, nor if unlabeled, to bear any statement respecting the amount of alcohol contained, but, if labeled, the label must contain the statement. The casks in controversy were not labeled, therefore not subject to the provisions of the act. (b) The libel is predicated upon an examination of specimens under section 4 of the act; but the Secretary of Agriculture did not cause any notice to be given to the party from whom the samples were obtained, nor afford such party any opportunity to be heard. (c) The goods seized were, at the time of seizure, no longer in the "package" or condition in which the importer received them, but had become merged with the property of the State, and were therefore not under the operation of the interstate commerce clause of the Constitution or of any law subsisting [452] by virtue of such clause. The "original package" in this case was the car which was delivered upon the premises and into the possession of the defendant, and which had been entirely emptied of its contents before seizure of the 6 casks taken upon the warrant issued in this case. (d) Seizure of 6 casks upon a warrant for 65 casks was not authorized or legal. (e) In no event is a food or drug product subject to libel proceedings under section 10 of this act unless it is being or has been transported into another State for the purpose of sale. In this case the product seized was transported in bulk for the distinct purpose of being "finished" or, to use a nontechnical term, of being bottled and labeled; and it is admitted that, when ready for sale, the salable package bore a label containing a lawful statement respecting content of alcohol.

In support of the first ground of defence, it is contended that "the courts of the United States, in determining what constitutes an offense against the United States must resort to the statutes of the United States enacted in pursuance of the Constitution." In re Kollock, 165 U. S. 526, 17 Sup. Ct. 444, 41 L. Ed. 813. That "regulations prescribed by the President and by the heads of the depart-

ments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where the statute does not distinctly make the neglect in question a criminal offense." *United States v. Eaton*, 144 U. S. 688, 12 Sup. Ct. 767, 36 L. Ed. 591.) And that, therefore, this court, in construing this statute, cannot be influenced by any departmental rules or regulations prescribed for its enforcement, but can look alone to the terms of the statute, penal in character, to ascertain whether or not the owner of these casks of liquid can be held either liable to criminal prosecution or to confiscation of its property. In construing the terms of the statute, it is further insisted that a criminal offense cannot be created by implication, but only by direct and positive terms. Granting at once these several propositions to be sound, the crucial question is, Does the Food and Drugs Act in express terms require drug products to be labeled? The argument of counsel, that Congress intended by this act, not to correct the evil of failing to label, but of falsely and fraudulently labeling, and therefore drug products, even when put up in packages suitable for retailing, but which bear no labels, are not within the misbranding provisions of the act, is ingenious but untenable, and wholly refuted by the express terms of the act. The first section of it makes it "unlawful for any person to manufacture within any territory or the District of Columbia any article of food or drug which is adulterated or misbranded" within the meaning of the act. This is an unqualified prohibition against the manufacturing itself, so far as the Congress had the power to prohibit; that is, in these parts of the country over which it had full control and jurisdiction. Section 2 provides that:

The introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia or from any [453] foreign country, or shipment to any foreign country, of any article of food or drugs which is adulterated or misbranded, within the meaning of this act, is hereby prohibited.

Here was the exercise, to the fullest limit, by Congress of its power, under the interstate commerce clause of the Constitution, to prevent adulterated and misbranded food and drug products from being placed upon the markets and sold as pure and genuine ones in the several States by expressly banishing them from lawful interstate commerce. In view of these express provisions, I cannot hold with counsel that the evil intended by Congress to be met was simply the false and deceptive branding of drug products and not the sale thereof. The question therefore, recurs to whether this act in such direct terms requires the labeling of drug products offered for sale in the original package as to subject one failing to do so to a criminal prosecution or to confiscation of the property. The two sections from which I have quoted expressly provide for criminal prosecution and penalties for their violation. Sections 6, 7, and 8 of this act define the terms "drug" and "food" as used; what articles of each shall be deemed adulterated, and what articles of each shall be deemed misbranded. It is provided that:

The term "misbranded" as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or

label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular.

And further, "if the package fail to bear a statement on the label of the quantity or proportion of any alcohol," and other specified substances contained therein. Counsel insist that these provisions do not directly require a label, and that in order to warrant prosecution the provision should have been in effect:

For the purposes of this act an article shall also be deemed to be misbranded: In case of drugs * * * if the package or other container thereof fail to bear a label.

I think this is too technical, even under the strict rules governing the construction of criminal statutes. Suppose the provision had read "if the package fail to bear a statement on a label of the quantity of alcohol," etc., would it not as well meet the view of counsel? A label is defined by Webster to be "a slip of paper, parchment, etc., affixed to anything, and indicating the contents, ownership, destination," etc. The use of the word itself, therefore, carries the meaning that it is a descriptive paper affixed to the package, and in express terms the act requires the descriptive matter borne by the paper to include the statement of how much alcohol, etc., is contained in the package. It does not seem to me that the ruling in the case of *United States v. 20 Boxes of Corn Whiskey*, 133 Fed. 910, 67 C. C. A. 214, can be made at all applicable here. There an entirely different character of statute was being construed. It did not attempt to bar from interstate commerce the article unbranded, but only to bar the shipment "under any other than the proper name or brand known to the trade," of spirituous or fermented liquors or wines. This statute was unquestionably passed to prevent fraud upon the revenue, and not as a regulation of [454] interstate commerce. It follows that the first ground of defense must be unavailing.

The second, to the effect that the Secretary of Agriculture did not cause notice to be given the owner and allow hearing before seizure has been directly decided in *United States v. 50 Barrels of Whisky* (D. C.) 165 Fed. 966, where Judge Morris, in overruling an exception to the libel based on this ground, says:

Such seizures are not unusual, and it is plain that, if the harshness were conceded, it would not justify the court in reading into the law a limitation which it does not contain. The act provides two different proceedings to enforce its provisions. One is by criminal proceedings in personam; the other is by a proceeding in rem. by seizure of the offending thing itself, and forfeiture if found to be violative of the law. In this latter case there is no provision for a preliminary examination.

With this construction of the statute I am in entire accord, and defense on this ground must be overruled.

Nor do I think sound the third ground of defense, to the effect that in this case the car arriving at Wheeling and shunted into the private side track of respondent was the "original package" and not the several casks in which the liquid was contained. The term "original package" as employed by law, admits of no precise definition applicable to all. Generally, it is said to be a parcel, bundle, bale, box or case made up of or packed with some commodity with a view to its safety and convenient handling and transportation. It does not necessarily mean that goods shall be inclosed in a tight or sealed recep-

tacle. It relates wholly to goods as prepared for transportation, and has no necessary reference whatever to the package originally prepared or put up by the manufacturer. Indeed, the idea of the "original package" may well be made to cover certain forms of property which do not ordinarily admit of being packed or incased in any other manner than in the car or vessel in which they are transported, such, for instance, as steel beams, threshing machines, and other bulky articles. *Cook v. Marshall County*, 119 Iowa, 384, 93 N. W. 372, 373, 104 Am. St. Rep. 283. This definition has been quoted as being the most favorable I have found to the contention of respondent in this case. Many others have been carefully collated in 6 Words & Phrases, 5059, and the term has been fully discussed in *Austin v. Tennessee*, 179 U. S. 343, 21 Sup. Ct. 132, 45 L. Ed. 224. Without prolonging discussion, it seems to me clear that in this case the cask is the "original package," for the very simple reason that the car was wholly incompetent to "package" the liquid itself; the cask was a complete entity of itself, not connected or bound up with any other article, but capable of and in fact containing some 50 gallons of this liquid, an amount capable thereby of being safely and conveniently handled and transported; each cask was marked to the consignee, and if separated from the car was capable of shipment independent thereof without either loss or inconvenience; the casks were shipped independently from Detroit to Sandusky by vessel, and then transferred to the car for shipment to Wheeling, their final destination. And holding the cask to be the "original package," it becomes unnecessary to consider to any extent the fourth ground of defense, that a seizure of six casks under a [455] warrant for 65 casks was unlawful. The warrant being for the whole shipment, the Government, if it had the right of seizure at all, could take the whole or any part it could find in the original packages.

This brings us to the fifth and last defense relied upon, to the effect that this liquid extract was not shipped in these casks for the purpose of sale thus in bulk, but was so shipped to the owner thereof from one State to another for the purpose of bottling into small packages suitable for sale, and when so bottled it is admitted the bottles were labeled so as to express the content of alcohol and comply with the requirements of the act. A careful analysis of the provisions of the act has convinced me that this defense must be sustained. The language of the statute is:

Any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor.

Again:

Any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act, and is being transported from one State, Territory, District, or insular possession of the United States, or if it be imported from a

foreign country for sale, or if it is intended for export to a foreign country, shall be liable to be proceeded against in any District Court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation.

These provisions must be construed strictly in favor of the accused. So construed, I am persuaded they must be held to mean that any one owning an adulterated or misbranded food or drug product who ships to another in another State such product is guilty; that any one having received such product so shipped from another State by the owner or seller thereof, who shall, in the State where so received, deliver or offer to deliver such product to another in the original package, for pay or otherwise, shall be guilty; that any person who has received such product from any other State, who sells or offers it for sale, whether in the original package or not, in the District of Columbia or the Territories, is liable. Congress had no power except in the District of Columbia and the Territories to prohibit one from manufacturing adulterated food and drug products; it had no power to prevent one anywhere from personally consuming such products; it did have power to suppress the manufacture of such in the District of Columbia and the Territories, and by this act has done so; it had the further power to restrict in the course of commerce the transportation from State to State of such products, and it has done so; it had power, after such product was received from another State, to restrict its sale in the original package, and it has done so. It did not, in my judgment, have power to restrict one from manufacturing in one State such [456] product and removing it from that State to another for the purpose of personal use and not sale, or for use in connection with the manufacture of other articles to be legally branded when so manufactured. The Government's inspector was entirely justified in concluding that this shipment in these original package casks was a violation of this act, because they were consigned for shipment by Parke, Davis & Co., of Detroit, Mich., to the Knowlton Danderine Company, at Wheeling, W. Va., and they were not branded. It was reasonably to be assumed that Parke, Davis & Co. were the owners and sellers, while the Knowlton Danderine Company was the purchaser. From the agreed statement of facts, however, it is apparent that the formula of the preparation is a trade secret; that Parke, Davis & Co. were not the owners of this formula, but only the manufacturing agents, under contract, of the owner, the Danderine Company, and only acted as agent for the owner in directing such shipment to the owner itself of its own property; that such owner did not, "having so received" such product, either "deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person," the same; nor did it "sell, or offer for sale in the District of Columbia or the Territories of the United States."

It seems clear that the transportation of this liquid was solely to the bottles made in Wheeling instead of the transportation of the bottles from Wheeling to the liquid manufactured in Detroit, and that it was so bottled in Wheeling and properly branded before any sale or disposition of it was attempted. Under such circumstances I am constrained to hold that the six casks must be surrendered to respondent, and the libel dismissed.

UNITED STATES EX REL. ALSOP PROCESS CO., PETITIONER, V.
JAMES WILSON, SECRETARY OF AGRICULTURE, RE-
SPONDENT.

(Supreme Court, District of Columbia, April 30, 1909; Court of Appeals, District of Columbia, June 1, 1909.)

N. J. No. 498; 33 App. D., C. 472.

Held that a United States court can not entertain a petition for a writ of mandamus to compel the Secretary of Agriculture to refrain from issuing, in the form of a Food Inspection Decision, his opinion in regard to the effect of bleaching flour by the Alsop process.

Petition for a writ of mandamus to restrain the Secretary of Agriculture from publishing and circulating Food Inspection Decision No. 100. Petition dismissed.

[1]¹ On or about January 23, 1909, the Alsop Process Company filed in the Supreme Court of the District of Columbia a petition for a writ of mandamus directed to the Secretary of Agriculture alleging in substance that relator is a corporation engaged in the business of manufacturing and selling machinery and apparatus used by millers for the bleaching of flour by so-called Alsop process (giving a description of said process), and further, that the Secretary of Agriculture caused hearings to be held to determine whether flour bleached by the Alsop process was adulterated within the provisions of the Food and Drugs Act of June 30, 1906, and after hearing the evidence for and against flour thus bleached, decided that, in his judgment, flour so bleached was adulterated within the meaning of the aforesaid act, and that the Secretary of Agriculture, without warrant or color of law, published and caused to be published the said decision designated as Food Inspection Decision No. 100, which publicly condemned as adulterated within the meaning of the Food and Drugs Act flour bleached by relator's process to the great damage of its business. The petition prayed that the Secretary of Agriculture be commanded to revoke and cancel and annul said decision and not to deliver or circulate additional copies thereof.

Upon the filing of the petition the court issued a rule directed to the Secretary of Agriculture as respondent requiring him to show cause by a certain date therein named why the prayer of said petition should not be granted.

Respondent duly answered said petition and to this answer the relator filed a demurrer. The case came on for hearing upon the questions raised by the above-mentioned pleadings and the court [2] overruled relator's demurrer. The following is the opinion of the court:

STAFFORD, J. This is a petition for a writ of mandamus. A rule to show cause was issued which the respondent has answered and to this answer the petitioner has demurred. The case was heard upon the demurrer and would have been disposed of at the time had it not been that the court understood that the parties desired that an opinion should be filed dealing fully with all the points involved. The case has been left undisposed of in the hope that opportunity would be

¹ Numbers in brackets refer to pages of the Notice of Judgment.

found to prepare such an opinion, but the pressure of other duties having thus far prevented, and no likelihood appearing that the same can be done within the next few days, it is thought best to dispose of the case without answering categorically the numerous points made in the brief of the petitioner. After all what the case amounts to is this. The Secretary of Agriculture has made up his mind that bleached flour is obnoxious to the provisions of the pure food act and has made that opinion public, announcing at the same time that after six months, during which time the manufacturers and dealers will have an opportunity to adjust themselves to the situation, he will call upon the respective district attorneys to proceed against violators of the law. The petitioner claims to be the owner of a patent on the bleaching process and to be injured by the announcement of this opinion and intention. He is not the owner of any flour; he merely owns the patent and makes and sells the machinery. He says that the Secretary did not proceed according to the provisions of the pure food law in making up his mind; that he had no right to tell the public what opinion he had formed, nor what course he intended to pursue; that if he is going to recommend prosecutions at all he is bound to do so at once and not wait six months. He therefore asks this court, by the great writ of mandamus, to command the Secretary to vacate his decision, to take back what he has said, and hereafter to proceed strictly according to the law. The mere statement of the proposition seems to furnish its own answer and to render an elaborate opinion unnecessary. This court cannot change the fact that the Secretary entertains this opinion, nor the fact that he intends to call on the district attorneys to test the case in the courts. It cannot command him not to make his opinion and intention known and if it could it would be useless for he has already made it known, and the petitioner itself is making the fact still more widely known by this proceeding. The merits of the real question, namely, whether flour subjected to the bleaching process may be sold without violating the pure food law, is one that will ultimately be determined by the courts. In the meantime the Secretary is not violating any law in having an opinion and in telling the public what it is.

The demurrer is overruled.

The said Alsop Process Company stood upon its demurrer and prosecuted an appeal from the aforesaid judgment to the Court of Appeals for the District of Columbia. The case was then heard by said court on appeal and the judgment of the lower court was affirmed. [3] The following opinion was rendered by the appellate court.

ROBB, *J.* This is an appeal from the Supreme Court of the District overruling the demurrer of the relator to an answer of the defendant, appellee here, to a rule to show cause why a mandamus should not be issued against him.

In its petition the relator states that it is a corporation of the State of Missouri engaged in the manufacture of flour-bleaching machinery, which is sold throughout the United States and elsewhere and is extensively used by millers for bleaching flour. The process for which this machinery is designated is known as the "Alsop Process" and is covered by patent which is owned by the relator. The bleaching of flour by this process is accomplished by the passage of pure air

through a flaming discharge of electricity and the application of the resultant gaseous medium to the freshly milled flour as the latter passes through an agitator. The flour thus treated, the relator states, has no substance mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength, is not deprived of any valuable substance, nor has it been mixed, colored, or treated in any manner whereby inferiority is concealed, and contains no deleterious ingredient or other element injurious to health. The relator further states that prior to November 18, 1908, the Secretary of Agriculture inserted, or caused to be inserted, in certain milling journals and other periodicals throughout the country a notice to the effect that a hearing would be held on the subject of bleached flour at the Department of Agriculture on November 18, 1908, at which time the relator says it was present by a duly authorized officer and by an attorney, and that the hearing was also attended by many millers from various parts of the country; that this hearing was continued five days, and testimony for and against said process was introduced; that the attorney for the relator conducted the case for the millers favoring the bleaching process; that the relator's manager gave extended testimony at this hearing; that the entire proceedings were transcribed by a stenographer and made accessible to the public generally. This hearing, the relator avers, was without color of authority of law. The petition further states that on the 10th of December, 1908, the said Secretary of Agriculture unlawfully, arbitrarily, and oppressively, and without color or right of law, issued the following bulletin:

[Food Inspection Decision 100.]

BLEACHED FLOUR.

Flour bleached with nitrogen peroxide, as affected by the Food and Drugs Act of June 30, 1906, has been made the subject of a careful investigation extending over several months.

A public hearing on this subject was held by the Secretary of Agriculture and the Board of Food and Drug Inspection, beginning November 18, 1908, and continuing five days. At this hearing those who favored the bleaching process and those who opposed it were given equal opportunities to be heard.

[4] It is my opinion, based upon all the testimony given at the hearing, upon the reports of those who have investigated the subject, upon the literature, and upon the unanimous opinion of the Board of Food and Drug Inspection, that flour bleached by nitrogen peroxide is an adulterated product under the Food and Drugs Act of June 30, 1906; that the character of the adulteration is such that no statement upon the label will bring bleached flour within the law; and that such flour can not legally be made or sold in the District of Columbia or in the Territories; or be transported or sold in interstate commerce; or be transported or sold in foreign commerce except under that portion of section 2 of the law which reads:

"* * * *Provided*, That no article shall be deemed misbranded or adulterated within the provisions of this act when intended for export to any foreign country and prepared or packed according to the specifications or directions of the foreign purchaser when no substance is used in the preparation or packing thereof in conflict with the laws of the foreign country to which said article is intended to be shipped"; * * *

In view of the extent of the bleaching process and of the immense quantity of bleached flour now on hand or in process of manufacture, no prosecutions will be recommended by this department for manufacture and sale thereof in the District of Columbia or the Territories or for transportation or sale in interstate or foreign commerce, for a period of six months from the date hereof.

JAMES WILSON,
Secretary of Agriculture.

WASHINGTON, D. C., December 9, 1908.

The promulgation and circulation of this bulletin, the relator states, has worked irreparable harm and injury to it, and in effect deprived it of its property without due process of law "in that since the issuance and promulgation of said unlawful decision aforesaid by the respondent herein, and by reason thereof your petitioner has been unable to sell its patented process and apparatus aforesaid, the prospective purchasers of said patented process and apparatus aforesaid, refusing to buy and install the same for fear that they or their customers will, upon the recommendation of the Secretary of Agriculture, be prosecuted for manufacturing or selling an adulterated food product in violation of the provisions of said Food and Drugs Act, June 30, 1906." The petition closes with a prayer that the writ of mandamus issue to compel the Secretary of Agriculture to withhold recommendation of prosecutions against manufacturers of and dealers in flour bleached by said Alsop Process; to revoke, cancel and annul said decision of said Secretary, and not to deliver or circulate additional copies thereof, and that the Secretary of Agriculture be commanded to proceed relative to the subject of bleached flour in strict conformity with said Food and Drugs Act and the regulations of the department promulgated thereunder.

A rule to show cause was issued. In the answer filed by the Secretary he states "that it does not appear by the said petition that the said relator has any right, title, or interest in the matters affected by the judgment and action of your respondent referred to in the said petition, and is not a party to nor legally interested in the proceedings in which said judgment and action of your respondent have been made." He admits the relator owns the patent known as the "Alsop Process" for bleaching flour, but claims that its patented rights are wholly collateral to the right of said Secretary of Agriculture to decide whether flour bleached by the use of nitrogen peroxide is deleterious and adulterated within the meaning of said Food and Drugs Act; that the patenting of said process confers no right on relator and gives it no status to compel the respondent to change or revoke his decision that flour so bleached is adulterated. The answer denies that the effect on flour by the use of said process is as stated in the petition; on the contrary, the answer states "that the flour which is bleached is reduced and lowered in its quality and strength; that the said flour is so artificially colored as to conceal inferiority, and that it contains a poisonous and deleterious ingredient which has been added, and that the said flour is deleterious and injurious to [5] health." The respondent in his answer further says "that the bleaching of the said flour is effected by nitrogen peroxide, and that the resultant product is deleterious and is adulterated within the meaning of the aforesaid Food and Drugs Act approved June thirtieth, 1906"; that for many months prior to November 18, 1908, the respondent had made an exhaustive inquiry into the character, composition and purity of bleached flour and had caused the matter to be investigated exhaustively by the Bureau of Chemistry of his department, and "that from all the evidence adduced it was conclusively established that flour bleached with nitrogen peroxide was adulterated within the meaning of said Food and Drugs Act"; that in the exercise of abundant caution, however, the Secretary decided to renew the investigation and to consider the matter more fully before finally

deciding under the authority of said act whether said bleached flour was adulterated; that accordingly he issued a notice for said public hearing; that this hearing was entirely advisory; and that the millers and manufacturers and others who attended did so voluntarily. The result of this hearing, the Secretary says, was to put him in possession of further and additional evidence relative to the subject; that this hearing was authorized both impliedly by the provisions in said Food and Drugs Act and expressly by the provisions of the Agricultural Appropriation Act of Congress of May 23, 1908; that after due consideration he decided that flour bleached by the use of nitrogen peroxide is adulterated within the meaning of said Food and Drugs Act and forbidden by the terms of said act, and that he thereupon announced and published said decision of December 10, 1908; that this decision in no wise mentioned or in any way relates to the relator, and that, therefore, it has no status to seek any relief or redress in connection therewith. The Secretary in his answer denies the averments of the petition that his action was without right or color of law, denies the jurisdiction of the court to grant the writs, and states that he "passed no judgment upon the machinery of the relator, and has no jurisdiction over the same, nor concern therewith. The said relator is not an owner of bleached flour nor a manufacturer of the same. The judgment of the said respondent has to do only with the bleached flour, the product itself, and has no jurisdiction over or concern in one of the kinds of process by which the said product may be secured. And respondent submits that the claims of the said relator are wholly collateral, and that its petition fails to show any legal damage."

To this answer a demurrer was filed, which was overruled, and, relator choosing to stand upon its demurrer, final judgment was entered, and this appeal taken.

The first question to be disposed of is whether the interest of the relator in the subject matter involved is of such a nature as to entitle it to maintain this proceeding. The decision of the Secretary of Agriculture, which is here sought to be challenged, is to the effect that flour bleached by nitrogen peroxide is an adulterated product under said Food and Drugs Act. Neither the relator nor its process is mentioned in this decision. The relator is neither the owner nor the manufacturer of bleached flour. Its sole excuse for attempting to stay the hand of the Secretary is that since the promulgation of this decision by the Secretary it has been unable to sell its patented process and apparatus owing to the fear of prospective purchasers that upon the recommendation of the Secretary they will be prosecuted for manufacturing or selling an adulterated food product.

Whilst it is true that there is a distinction between cases where the extraordinary aid of mandamus is invoked merely for the purpose of enforcing or protecting a private right and cases where the purpose of the application is the enforcement of a purely public right, the people at large being the real party in interest (High on Extraordinary Remedies, Par. 430; 26 CYC 404 and cases there cited), it has never been held, at least to our knowledge, that such an indirect and collateral interest as is here shown will sustain a petition for the writ.

Union Pac. R. R. Co. *v.* Hall, 91 U. S. 343, and Board of Liquidation *v.* McComb, 92 U. S. 531, in our opinion, do not sustain appel-

lant's contention that it has a suffi[6]cient interest to entitle it to institute this proceeding. In the former case it was held that merchants in Iowa having frequent occasion to receive and ship goods over the Union Pacific Railroad Company might, without the intervention of the Attorney-General of the United States, institute a proceeding under an act of Congress which conferred upon the proper circuit court of the United States jurisdiction to hear and determine all cases of mandamus to compel said railroad company to operate its road as required by law. It will thus be seen that a duty was laid upon the railroad company to operate its road in the interests of the public. Its failure in that regard wrought a direct injury to the merchants who were permitted to institute proceedings. The court went no further than to hold that the writ of mandamus may be issued at the instance of a private relator in all cases "where the defendant owes a duty, in the performance of which the prosecutor has a peculiar interest," and also "in case of applications to compel the performance of duties to the public by corporations." In the latter case the relator was the holder of bonds directly affected by the funding act, the carrying out of which he sought to have restrained.

We have carefully examined the other cases cited by relator on this point, and find that they go no further than the cases above reviewed.

The relator as a corporate entity has no interest in the enforcement of duties owing by the Secretary to the public. It seeks to arrest the operations of an executive department of the Government solely because the indirect effect of the promulgation of an opinion by the head of that department has been to cause millers to cease purchasing relator's machinery. In all the cases relied upon by relator mandamus was granted to secure to the relators rights which they were entitled personally to enjoy. Measured by this test, it is apparent that the relator has no such interest in the subject matter of this controversy as to entitle it to the writ. Being neither an owner nor a manufacturer of bleached flour, its legal rights were not involved or invaded by the action of the Secretary. It is a mere volunteer in this proceeding and as such is without standing.

There is some analogy between a suit in equity for the abatement of a public nuisance and the present case. Yet it is well settled that such a suit will not be sustained unless the complainant shows special, direct, and material damages; *Georgetown v. Alexandria Canal Co.*, 12 Peters, 91; *Irwin v. Dixon et al.*, 9 How. 9; *State of Penna. v. Wheeling Bridge Co. et al.*, 13 How. 518; *Miss. & Mo. R. R. Co. v. Ward*, 2 Black, 485. In the case last cited it was said: "A bill in equity to abate a public nuisance, filed by one who has sustained special damages, has succeeded to the former mode in England of an information in chancery, prosecuted on behalf of the Crown, to abate or enjoin the nuisance as a preventive remedy. The private party sues rather as a public prosecutor than on his own account; and unless he shows that he has sustained, and is still sustaining, individual damages, he can not be heard."

The rule permitting private parties, whose rights are directly jeopardized, to maintain mandamus to compel a public duty is a salutary one, but it should not be enlarged to such an extent as to permit interference with the operations of the Government by those whose rights are only remotely and indirectly affected.

Having determined that the relator's interest in the subject matter involved is too remote to entitle it to institute this proceeding, it becomes unnecessary to consider any other question.

The order is, therefore, affirmed, with costs.

UNITED STATES v. 100 BARRELS OF CALCIUM ACID PHOSPHATE.

(District Court, N. D. California, June 22, 1909.)

N. J. No. 300.

A compound of calcium acid phosphate and corn starch labeled "C. A. P." held to be a mixture or compound sold under its own distinctive name and not adulterated or misbranded by reason of the presence of corn starch.

Libel under section 10 of the Food and Drugs Act. Heard by court on libel and answer. Libel dismissed.

[5] DE HAVEN, *District Judge*. It is provided in subdivision 4, section 8 of the act of June 30, 1906 (34 Stat., 768), under which this action is prosecuted, that "an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

Second. * * *

It clearly appears from the evidence that the substance referred to in the libel, and sought to be condemned in this action, is compounded of calcium acid phosphate and corn starch, the mixture containing about 33½ per cent of corn starch.

It also appears that the addition of corn starch does not render the mixture deleterious or in any way dangerous to the health of persons eating food in the proportions in which said compound is used.

It further appears that said compound when first manufactured was known as and sold as "Cream Acid Phosphate;" that said name was thereafter condensed to the use of the arbitrary letters "C. A. P." and applied particularly to the substance or product referred to in the libel for the purpose of distinguishing it from other products; that the claimant herein adopted said letters C. A. P. as its trade-mark. In other words, the substance referred to is manufactured and sold under the distinctive name of "C. A. P."

It follows from the foregoing that the plaintiff is not entitled to recover in this proceeding; that while the article sold, under the trade name of "C. A. P." may be classed as an article of food, it does not contain any poisonous or deleterious ingredients, within the meaning of the statute above quoted, and the libel must therefore be dismissed.

So ordered.

UNITED STATES *v.* KOCA NOLA CO.

(Circuit Court, N. D. Georgia, August 22, 1909.)

N. J. No. 202.

An article labeled "Koca Nola Syrup" held adulterated because it contained cocaine, and misbranded because the quantity or proportion of cocaine present was not declared on the label.

Informations alleging violations of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

[2] *NEWMAN, Circuit Judge* (charge to the jury). The defendant, the Koca Nola Company, is charged in this information with the violation of what is known as "the Food and Drugs Act of 1906." This act provides first, so far as is material here, that "the introduction into any State or Territory or the District of Columbia, from any other State or Territory or the District of Columbia, or from any foreign country or shipment to any foreign country of any article of food or drink which is adulterated or misbranded under the meaning of this act, is hereby prohibited," and then that any person who shall violate this act shall be guilty of a misdemeanor and shall be punished as provided in the act.

You understand, of course, that this is a Federal statute, and consequently deals only with things between States and between States and the District of Columbia, and between the United States and foreign powers. The United States have no jurisdiction whatever with reference to anything occurring within the States or within any Territory. The States themselves have jurisdiction of such matters.

You are trying the defendant on two criminal informations which are consolidated for the purpose of this trial. The first information, No. 7594, charges that the defendant, the Koca Nola Company, shipped to New Orleans, in the State of Louisiana, from Atlanta, in the State of Georgia, a package of Koca Nola syrup containing cocaine, without having the same branded upon the label on the package containing the Koca Nola syrup.

The second count in that information charges the defendant with shipping the same package from Atlanta, Georgia, to New Orleans, Louisiana, and charges that it contained a deleterious ingredient, to wit: Cocaine, which, the information alleges, may render and which did render said Koca Nola syrup injurious to health.

[3] You see the first count in that first information charges that they shipped the package from Atlanta to New Orleans without the same being properly labeled, and the second count in that information is with reference to the same package and charges that it contained a deleterious ingredient, injurious to health.

The other information, No. 7630, contains three counts. Only the first and third counts are insisted on by the Government. The second is with reference to drugs, and the United States, upon information, concedes now that this is not a drug, it is a food, and consequently they admit that the act applying to drugs is not applicable here, and only the first and third are insisted upon by the Government. The first charges the defendant with the shipping of a pack-

age of Koca Nola syrup from Atlanta, Georgia, to Anacostia, in the District of Columbia, and the same charges are made with reference to that as in the first count of the other information, that is to say, it was not properly labeled.

The third count charges the shipment of the same package from Atlanta, Georgia, to Anacostia, in the District of Columbia, and that it was adulterated and contained an added deleterious ingredient, namely cocaine, which may and does render the syrup injurious to health.

So you see you have really four counts, two in the first information and two, the first and third, which are insisted upon, in the second information.

You will express by your verdict which are the counts on which you find the defendant guilty, if you find it guilty at all.

The first count in each of the informations is under that provision of the act of Congress referred to which relates to misbranding of foods. The eighth section of the act provides that "for the purposes of this act an article shall be deemed to be misbranded," so far as material here, and leaving out immaterial language and articles mentioned, "if it fail to bear a statement on the label of the quantity or proportion of any * * * cocaine * * * or any derivative or preparation" of cocaine or any derivative of the same.

To state it again "For the purposes of this act an article shall be deemed to be misbranded if it fail to bear a statement on the label of the quantity or proportion of any cocaine or any derivative of the same."

You will see from the act that a package containing any article of food, if it contain cocaine or any derivative or preparation of the same, must be so branded. In the opinion of the court, notwithstanding the fact that you may believe from the testimony that so far as cocaine was contained in this Koca Nola syrup shipped by the defendant it was in what are called "derivatives" of the same, still, if you believe that cocaine, in any appreciable quantity, was in the syrup, it should have been so stated on the label. The object of the law is apparent, that is that the public shall be put distinctly on notice, and cocaine, among other things mentioned in the act, if it be in any preparation of food or drink, it must be so stated on the label. And it is immaterial also, in the opinion of the court, if it is a small quantity, if it is an appreciable quantity. This act says "any cocaine" and if it contained any appreciable quantity of cocaine, it should have been, in the opinion of the court, shown by the label.

The testimony of all of the witnesses for the Government, as I understand it, is to the effect that there was cocaine in both of these packages, the one shipped to New Orleans and the one shipped to Anacostia, and it is for you to say whether there would have been any difficulty about their stating exactly or approximately the proportion or quantity of cocaine contained in the syrup. Some of these witnesses, three I believe, have stated that they could have stated on the label the quantity contained, and while it was small, the fact that it was a small quantity would not render it, in the opinion of the court, any the less a violation of the law. It would be a matter of degree only.

[4] The second count in the first information and the third count in the second information are based on the provision of the law that

for the purposes of the act an article shall be deemed to be adulterated, leaving out immaterial language, "if it contain any poisonous or other added deleterious ingredient which shall render such article injurious to health."

You will inquire, in the first place, whether there was any cocaine or cocaine derivatives in this syrup and if so, if you believe that to be a deleterious ingredient, injurious to health. There has been testimony about that, and you will determine, in the first place, whether there was any cocaine contained in the syrup shipped to New Orleans and to Anacostia, and if it was labeled, as in the first counts in the informations, and if you believe it contained cocaine, was the same an article injurious to health, under the second counts in these informations.

Mr. Austin, who states that he is the president of the Koca Nola Company, Dr. Everhart and Dr. Heath have testified as you have heard on the stand. I understand their testimony was—first, Mr. Austin testified generally to the facts and his testimony you have heard. He claimed to be under the impression that it had no cocaine in it at all. And Dr. Everhart says he used these bottles, which were gotten here, offered for sale in the market, that the same had water all ready in it, and that it contained, so far as he could ascertain, no cocaine. Dr. Heath, I believe, said that he got the bottles for Dr. Everhart.

If you believe that the syrup shipped to New Orleans was misbranded and did not contain on the label on it that which it should have had, find the defendant guilty on the first count in the first information, No. 7594. If you believe that the same contained a deleterious ingredient, injurious to health, to wit: cocaine, find the defendant guilty on the second count in the first information.

If you believe that the package of syrup shipped to Anacostia in the District of Columbia, was misbranded, as I have stated to you, and that it contained cocaine and the same did not appear on the label, find the defendant guilty under the first count of the second information, No. 7630. If you find that this package shipped to Anacostia contained a deleterious ingredient, injurious to health, find the defendant guilty on the third count in that information, that is cocaine, as I have stated.

As to the other, of course, it will be apparent that it shall not, in the second count in this second information.

Now, gentlemen, the evidence is before you and it is a matter entirely for you to determine. You understand the purpose of this act so far as branding and labeling articles of food is concerned and that is to put the public on notice that it contains in it certain ingredients which the law-makers have believed the public should know before purchasing.

As to the other, of course, it will be apparent that it shall not, in any event, whether branded or not, contain deleterious ingredients, injurious to health.

If you believe the defendant not guilty under any or all of the counts in the informations, you will find the defendant not guilty as to that or those.

Consider all of the testimony and determine whether these two particular packages, those are the ones with reference to which the charges here are made, whether they contain cocaine or not.

You will see without difficulty, and I state again, that there are only four counts, two in the first and two in the second, leaving out the second count in the second information or that of the highest number. The first information refers to the package shipped to New Orleans and the first count to misbranding and the second to adulteration. The second information related to the package shipped to Anacostia, and the first count relates to misbranding and the second to adulteration.

Take the case, gentlemen; and express by your findings if you find the defendant guilty or not guilty, and if you believe it guilty express by your verdict under which counts you believe it to be guilty, whether under any or all of the counts.

UNITED STATES v. 68 CASES OF SYRUP.

(District Court, E. D. Illinois, October 1, 1909.)

172 Fed. 781; N. J. No. 283.

An article composed of cane syrup and extract of maple wood labeled, on the shipping cases, "Western Reserve Ohio Blended Maple Syrup * * *" and on the bottles, "Western Reserve Ohio Blended Syrup, * * *," held not misbranded.

On demurrer to libel. Sustained. Libel dismissed.

[782]¹ WRIGHT, *District Judge*. This is a libel presented by the United States against Sixty-Eight Cases of Syrup under the provisions of Food and Drugs Act, June 30, 1906, c. 3915, 34 Stat., 768 (U. S. Comp. St. Supp. 1907, p. 928). The libel charges that the cases of syrup were shipped from Cleveland, Ohio, to Danville, Ill., and that 48 of them contained each one dozen bottles, and 20 of them contained each two dozen bottles, of syrup; that the cases were branded and labeled "Western Reserve Ohio Blended Maple Syrup, guaranteed absolutely pure, shipped by Western Reserve Syrup Company, Cleveland, Ohio;" and that the bottles were labeled and branded "Western Reserve Ohio Blended Syrup, Western Reserve Syrup Company, Cleveland, Ohio, Blenders of Fancy Maple Syrup and Maple Sugar." It is further charged in the libel that the cases and bottles were misbranded in violation of the act of Congress to which reference has been made, subjecting the property to condemnation as provided in said act, for the reason that the cases and bottles do not contain maple syrup, or a blend of maple syrup, but do contain a mixture or compound largely of refined cane sugar flavored with an extract of maple wood, and that the labeling before mentioned is misleading and false, so as to mislead the purchaser, and so as to offer the contents for sale under the distinctive name of another article. The goods were shipped to the Webster Grocery Company, doing business in Danville, Ill., and by this proceeding seized, and are now in the custody of the marshal. The Western Reserve Syrup Company, of Cleveland, Ohio, the manufacturer, shipper, and seller of the goods, has appeared by its attorney in this proceeding and filed its demurrer to the libel; and the court, having heard the argu-

¹ Numbers in brackets refer to pages of Federal Reporter.

ment of counsel, thereupon took the case under advisement and for future determination.

In the argument at bar of the case it was contended for the respondent that there is a distinct and substantial difference in the labeling upon the cases and that upon the boxes; that in the former the word "Maple" is used, and in the latter, the case of the bottles, that word is omitted, as a qualifying word in the description of the syrup. Without again quoting the words of the labeling, but referring again to them as above set out in this opinion, it will be seen that, while the word "Maple" is not used as a qualifying word to syrup, yet further on in the words of the label it is found that respondent describes itself as blenders of "Fancy Maple Syrup and Maple Sugar," so that, when all the words of the label put upon the bottles are seen, and its full meaning comprehended, I think the same meaning was intended in the use of both labels, and from either of them, that upon the cases and that upon the bottles, a person of ordinary intelligence, after reading them or either of them, would infer the same meaning that the bottles [783], as well as the boxes, contained blended maple syrup. So it seems to me that the contention of the respondent that the label upon the boxes, which alone was intended to induce the purchasers, even conceding this, is without force. It then being determined that the labeling upon the cases and upon the bottles mean the same thing, namely, that each contained blended maple syrup, it only remains to decide whether, in view of the other averments of the libel, a violation of the statute is shown.

If the brands or labels correctly or truthfully disclose the contents of the cases and bottles, and no poisonous or deleterious ingredients are apparent, there can, I am persuaded, be no violation of the law, and this action could not be supported. There is no claim that poisonous or deleterious ingredients entered into the compound. The libel avers it was not maple syrup. The labels do not purport to state that the contents of the boxes and bottles was maple syrup; but, as said before, both labels represent the same fact—that the contents of the boxes and bottles was blended maple syrup. The libel avers that the cases and bottles do not contain a blend of maple syrup, and then specifically states they do contain a mixture or compound largely of refined cane sugar flavored with an extract of maple wood. The demurrer of the respondent to the libel admits all the facts well pleaded in the libel, and, while it is stated by the libel that the boxes and bottles do not contain a blend of maple syrup, the following statement in the libel, that the contents consisted of a mixture or compound largely of refined cane sugar flavored with an extract of maple wood, renders the previous negation of a blend of maple syrup nugatory as a fact stated, but leaves it as a mere conclusion of the pleader, that is not admitted by the demurrer. So it seems to me the case resolves itself to the single question whether a mixture or compound largely of refined cane sugar flavored with an extract of maple wood is blended maple syrup.

The plain and manifest object of the statute under consideration is to protect the purchasers and consumers of drugs and foodstuffs from fraud and imposition in the purchase or consumption of such articles under false representations, and to insure that the commodities are such as they are represented to be. If the brands or labels upon the goods in question were truthful, and such as the law per-

mitted upon such goods as they actually were, then there was no violation of the law, and the goods were wrongfully seized, and should be returned to the person or persons from whom they were taken. The proviso to section 8 of the statute under which this libel is being prosecuted provides in legal effect, amongst other things, that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word "compound," "imitation," or "blend," as the case may be, is plainly stated on the package in which it is offered for sale; and the term "blend" so used, shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only.

[784] I have already said that the brands or labels in question plainly indicate that the article of food, the syrup in this case, was a blend of maple syrup, and the statute itself declares that the term "blend" shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients, used for the purpose of coloring and flavoring only. I think I may take judicial notice of all that an ordinarily intelligent person knows, and in doing this I know that food syrup is a saccharine solution of a superior quality, frequently called molasses, and it may be made of any of the various sugars of commerce, such as cane, beet, or maple. These sugars are alike, in that they are saccharine. The statute defines a blend of anything to be the mixture of like substances not excluding the flavoring. In the case presented the mixture is cane sugar flavored with extract of maple wood. It seems to me no argument is necessary to prove that all food sugars are of like substances, and to them or any of them add the flavoring extract of maple wood and thereby is produced the very blend contemplated by the exception of the statute I have endeavored to point out.

Even without this plain exception provided for by the law itself, no ordinarily intelligent person could be deceived by the labels in question into buying the articles so labeled for real maple syrup. The word "blend" is clearly used, both as to the articles and their manufacture, and of its own clear import indicates a mixture and imitation. Entertaining the views I have expressed, it follows that I am of the opinion the libel is insufficient in law, and the demurrer will therefore be sustained.

Let an order be prepared sustaining the demurrer, dismissing the libel, and awarding a return of the property, without costs.

UNITED STATES v. 779 CASES OF MOLASSES. (Two cases.)

(Circuit Court of Appeals, Eighth Circuit, November 5, 1909.)

174 Fed. 325; N. J. No. 270.

An article of food labeled as molasses of a particular brand, with statements elsewhere on the labels setting forth that it was a compound of molasses and corn syrup, *held* not adulterated or misbranded.

In Error to and Appeal from the District Court of the United States for the Eastern District of Arkansas.

Libel under section 10 of the Food and Drugs Act.

Judgment for claimant on directed verdict, and the United States brought error in one case and appeal in the other. The judgment of the lower court was affirmed in the case brought on error and the appeal in the other case was not granted.

[326]¹ Before VAN DEVANTER, Circuit Judge, and CARLAND and POLLOCK, District Judges.

POLLOCK, *District Judge*. This is a libel of condemnation arising under the provisions of the pure food and drug law enacted by Congress June 30, 1906 (34 Stat. 768, c. 3915 [U. S. Comp. St. Supp. 1909, p. 1188]), and the regulations of the Secretaries promulgated October 20, 1906, in pursuance of power conferred on them by section 3 of the act. The facts are:

One C. E. Coe, a merchant of the city of Memphis, Tenn., at various dates between March 18 and August 1, 1908, sold and shipped the seven hundred and seventy-nine cases of molasses in controversy to certain wholesale jobbing houses in the city of Little Rock, Ark. Thereafter, on August 19, the district attorney for the District of Arkansas filed his libel of condemnation, in which it was charged the molasses was both adulterated and misbranded in violation of the provisions of the act. A writ of seizure was issued and executed by the marshal, seizing, as shown by his return, six hundred and eighty-five cases of the molasses in question. Of the cases seized, as shown by his return, four hundred and sixty-four were what is labeled "sugar glen" molasses, and two hundred and twenty-one cases as "burro" molasses.

Thereafter, on September 21, 1908, by leave of court, an amended libel of condemnation was filed in which it was charged the molasses contained in the cases was adulterated by the use of commercial glucose, mixed and packed with the molasses to such extent as to injuriously affect the quality and strength in violation of the law. And it was further charged, in substance, the cases were so labeled and misbranded as to convey the impression the contents of the cases were pure sugar house molasses, whereas, in truth, they were a compound of sugar molasses and corn syrup.

Thereafter, Coe filed his [327] affidavit as claimant of the molasses and answered, setting up his guarantee to the purchasers under the terms of the act, denied the charges of adulteration and misbranding, attached as exhibit to his answer a copy of the label of each brand of molasses sold and delivered by him, and demanded a trial by jury, as provided by section 10 of the act, and gave a bond as provided in the act to secure possession of the molasses.

A trial by jury was had, at which, by direction of the court, the jury returned a verdict in favor of the claimant, on which a judgment was entered in his favor. From this judgment the Government, being uncertain as to its rights, prosecutes its appeal in case No. 3024 and also prosecutes error in case No. 3030.

From the statement made it would seem quite plain the proceedings on the trial cannot be reexamined by this court on the appeal taken. Section 10 of the act, among other matters, provides, as follows:

That any article of food, drug or liquor that is adulterated or misbranded within the meaning of this act, and is being transported from one State, Terri-

¹ Numbers in brackets refer to pages of Federal Reporter.

tory, district or insular possession to another for sale, or having been transported, remains unloaded, unsold or in original unbroken packages, or if it be sold or offered for sale in the District of Columbia or the Territories, or insular possessions of the United States, or if it be imported from a foreign country for sale, or if it is intended for export to a foreign country, shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. * * * The proceedings of such libel shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States.

The right to trial by jury granted by this act on demand of either party is absolute, and means a trial by jury according to the established practice in courts of common law. *Elliott v. Toeppner*, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. Ed. 200; *Insurance Company v. Comstock*, 16 Wall. 258, 21 L. Ed. 493; *Parsons v. Bedford*, 3 Pet. 433, 7 L. Ed. 732; *Bower v. Holzworth et al.*, 138 Fed. 28, 70 C. C. A. 396; *Duncan v. Landis*, 106 Fed. 839, 45 C. C. A. 666. By Article VII of the Constitution it is provided:

No fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Mr. Justice Clifford, delivering the opinion of the court in *Insurance Company v. Comstock*, supra, in commenting on this provision of the Constitution, said:

Two modes only were known to the common law to re-examine such facts, to wit: the granting of a new trial by the court where the issue was tried, or to which the record was returnable, or secondly by the award of a *venire facias de novo* by an appellate court for some error of law which intervened in the proceedings. All suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights, are embraced in that provision. It means not merely suits which the common law recognized among its settled proceedings, but all suits in which legal rights are to be determined in that mode, in contradistinction to equitable rights and to cases of admiralty and maritime jurisdiction, and it does not refer to the particular form of procedure which may be adopted.

As a jury trial was demanded by the claimant in this case, and as such trial was had, the appeal taken in case No. 3024 must be [328] dismissed because such method is inappropriate to review the proceedings had. It is so ordered.

At the trial the charge of adulteration was abandoned by the Government, and it relied solely and alone on the charge of misbranding. As has been seen, at the conclusion of the evidence the court charged the jury neither of the labels under which the cases of molasses were sold and shipped from Memphis to Little Rock was misleading, nor constituted a misbranding, as that term is employed in the act, nor in regulation 17 promulgated by the Secretaries under authority of the act. This action of the court constitutes the sole ground of error relied upon to work a reversal of the judgment rendered in the case.

The only evidence adduced on the trial was that of the marshal who executed the writ of seizure and that of Geo. B. Spencer, a Government chemist from the Department of Agriculture. The marshal testified the cases of molasses seized by him bore labels identical with those attached to and made part of the answer of claimant, which labels were offered and received in evidence at the trial, as Exhibits A and B.

The witness Spencer testified he made a chemical analysis of the brands of molasses seized in this case; that the sugar glen brand con-

tained 30 per cent and the burro brand 40 per cent of commercial glucose; that pure molasses contains no commercial glucose, but does contain natural glucose; that neither natural nor commercial glucose is injurious or deleterious to health; that a large number of syrups on the market contain as high as 80 per cent or 90 per cent commercial glucose; that according to the practice and rulings of the Bureau of Chemistry of the Department of Agriculture the labeling or branding of commercial glucose, as "made from corn syrup" is permissible.

The provisions of the act prescribing what shall constitute a misbranding, within its meaning as applied to food products, are as follows:

If it be labeled or branded so as to deceive or mislead the purchaser * * * If the package containing it or its label shall bear any statement, design or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular; provided that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

Second. In the case of articles labeled, branded or tagged so as to plainly indicate that they are compounds, imitations or blends, and the word "compound," "imitation" or "blend," as the case may be, is plainly stated on the package in which it is offered for sale.

Regulation 17 of the Secretaries, (which has the effect of law) on the subject of misbranding, in so far as here thought applicable, provides:

[329] (a) The term "label" applies to any printed, pictorial, or other matter upon or attached to any package of food or drug product, or any container thereof subject to the provisions of this act.

(b) The principal label shall consist, first, of all information which the Food and Drugs Act, June 30, 1906, specifically requires, to wit, the name of the place of manufacture in the case of food compounds or mixtures sold under a distinctive name; statements which show that the articles are compounds, mixtures, or blends; the words "compound," "mixture," or "blend," and words designating substances or their derivatives and proportions required to be named in the case of foods and drugs. All this information shall appear upon the principal label, and should have no intervening descriptive or explanatory reading matter. Second, if the name of the manufacturer and place of manufacture are given, they should also appear upon the principal label. Third, preferably upon the principal label, in conjunction with the name of the substance, such phrases as "artificially colored," "colored with sulphate of copper," or any other such descriptive phrases necessary to be announced should be conspicuously displayed. Fourth, elsewhere upon the principal label other matter may appear in the discretion of the manufacturer. If the contents are stated in terms of weight or measure, such statements should appear upon the principal label and must be couched in plain terms, as required by regulation 29.

(c) If the principal label is in a foreign language, all information required by law and such other information as indicated above in (b) shall appear upon it in English. Besides the principal label in the language of the country of production, there may be also one or more other labels, if desired, in other languages, but none of them more prominent than the principal label, and these other labels must bear the information required by law, but not necessarily in English. The size of the type used to declare the information required by the act shall not be smaller than 8-point (brevier) capitals: *Provided*, That in case the size of the package will not permit the use of 8-point type, the size of the type may be reduced proportionately.

(d) Descriptive matter upon the label shall be free from any statement, design, or device regarding the article or the ingredients or substances contained

therein, or quality thereof, or place of origin, which is false or misleading in any particular. The term "design" or "device" applies to pictorial matter of every description, and to abbreviations, characters, or signs for weights, measures, or names of substances."

If the labels in question be now compared with the provisions of the law above quoted, we find the first panel of each, and that contended by the claimant to be the principal label, to contain, first, the name of the substance or product; second, the place where manufactured or canned; third, words showing the article to be a compound; fourth, the words "compound and ingredients;" fifth, the name of the manufacturer or canner of the product; sixth, that it contains sulphur dioxide; seventh, that it is guaranteed under the pure food act, serial No. 13,905, all as required by clause "b" of regulation 17 above quoted. From a further examination of the labels, it is found each in three places distinctly states the product to be a compound of molasses and corn syrup.

As shown from the evidence, this compound contains no substance deleterious or injurious to the health; and, as it further appears from the evidence, under the practice of the department, commercial glucose may be properly labeled and sold under the name of "corn syrup," we are of the opinion there is nothing in the manner in which the cases of molasses involved in this controversy were labeled that is false or untrue, or which would tend to mislead or deceive a purchaser of [330] ordinary prudence, and there is no evidence found in the record tending to show any one was so deceived or misled by the labels employed.

The authorities relied upon by the government to make out the charge of false branding, as shown by an examination, are cases in which it was determined the labels contained false statements as to the contents of the receptacle labeled. Such cases, for the reasons given, are not applicable to the facts in the case at bar.

The direction of the court to return a verdict in favor of the claimant was right and must be affirmed.

UNITED STATES v. EDWARD WESTEN TEA & SPICE CO.

(District Court, E. D. Missouri, November 30, 1909.)

N. J. No. 194.

"Lemon Flavor" is synonymous with lemon extract, and an article labeled "lemon flavor" is adulterated and misbranded if it fails to comply with the standard for lemon extract as that product is known and understood by the trade and public.¹

Informations alleging violations of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

[2] DYER, *District Judge* (charge to the jury). The act of Congress under which these informations have been filed, went into effect on the 1st day of January, 1907. It is, therefore, quite a recent statute.

The States in their separate capacities, may have undertaken to regulate the sale of food products, but until this act was passed Con-

¹ Contra, *United States v. St. Louis Coffee & Spice Mills*, p. 196, *ante*.

gress had taken no effective action to prevent the adulteration and misbranding of articles of drugs, food, etc.

Here we have only to deal with congressional acts.

The court has nothing to do with State statutes applying to the same thing. This court gets jurisdiction only by virtue of an act of Congress conferring upon the court the jurisdiction to try such offenses as these.

Congress has the power to legislate for the Territories, including the District of Columbia. The laws passed by Congress with reference to the manufacture and sale of articles in the Territories and the District of Columbia, is exclusively with Congress.

Under the interstate commerce laws, Congress has undertaken to say what shall and what shall not be proper shipments in interstate commerce between States. It has undertaken to say in the act to which I have referred, what is an adulteration [3] and what is a misbranding of articles manufactured and sent to other places within the State proper. Under the Constitution Congress had full and complete authority to do that.

The first section of this act refers to the District of Columbia and the Territories.

The second section prohibits the sending in interstate commerce, from one State to another, articles of food that are adulterated or articles of food that are misbranded, and they have announced a penalty in the statute against those things.

In view of what has been said by counsel in reference to this recent act of Congress, it will probably not be unprofitable for the court to say something in reference to the matter.

The second section of the statute, to which I call your attention, provides:

That the introduction in any State or Territory, or the District of Columbia, from any other State or Territory, or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this act, is hereby prohibited. And any person who shall ship, or deliver for shipment, from any State or Territory or the District of Columbia, or to any other State or Territory, or the District of Columbia, or to a foreign country; or who shall receive in any State or Territory or the District of Columbia, from any other State or Territory or the District of Columbia, or foreign country, and having so received shall deliver in original, unbroken packages, for pay or otherwise, or offer to deliver to any other person any such article so adulterated or misbranded, within the meaning of this act; or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs; or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor and for such offense be fined not exceeding two hundred dollars (\$200) for the first offense; and upon conviction, for each subsequent offense not exceeding three hundred dollars (\$300), or by imprisonment not exceeding one year, or both, in the discretion of the court.

So as to acquaint you, as the court has tried to acquaint himself, with the *modus operandi* provided by this statute for finding out and ascertaining whether or not this law has been violated, the third section provides that the Secretary of the Treasury, the Secretary of Agriculture and the Secretary of Commerce and Labor, shall make uniform rules and regulations for carrying out the provisions of this act, including the collection and examinations of specimens of food and drugs manufactured or offered for sale in the District of Colum-

bia, or any of the Territories of the United States; or which shall be received from any foreign country, or intended for shipment to any foreign country; or which shall be submitted for examination, or at any domestic or foreign port through which said product is offered for interstate commerce.

There is the authority conferred upon these members of the different departments, to make regulations for the gathering of testimony or evidence, so to speak, of any violation of these laws. Then it was provided, and was read here in this stipulation:

That the examination of specimens of food and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, under the direction and supervision of said bureau, for the purpose of determining from such examination whether such articles are adulterated or misbranded, within the meaning of this act.

You will see by the testimony in this case, that in each of these cases a Government officer went to the place of business of the parties named and bought from them the bottles containing this mixture, and he sent them to the laboratory—one to the Boston and the other to the Chicago laboratory, all passed upon by the Government authorities and by them found to be adulterated.

[4] Then what follows? The Government does not put a defendant to trial because of that inquiry alone, but it goes further and says: If that be found to be so from the examinations made of this product (and you will remember that the officers of the Government, who bought these articles, testified here that they sent two bottles to one place, two bottles to another place, and the remaining two bottles were left with the person from whom they were taken), as shown in those bottles, that they had been adulterated, and that they had been misbranded, then they were required to go further, after that was ascertained.

Finding that they were adulterated or misbranded, within the meaning of the act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such samples were obtained.

So this defendant was notified by the Secretary of Agriculture that these articles had been bought and that they had been found to be adulterated; but before authorizing any action to be taken by the district attorney, a hearing was had, at which the defendant was authorized to appear; and after that hearing (the department being still satisfied, from the hearing, that the articles had been adulterated or misbranded), it became the duty of the Secretary under this act of Congress, to transmit to the district attorney instructions to begin the proceedings, together with a copy of the analysis made at the time of the examination.

From the evidence in these cases, and from the stipulation filed, it appears all of that was done, and these proceedings commenced. This act provides that:

For the purpose of this act an article shall be deemed to be adulterated in case of food, first, if any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength; second, if any substance has been substituted wholly or in part for the article; third, if any valuable constituent of the article has been wholly or in part abstracted; fourth, if mixed, colored or powdered in a manner whereby damage or inferiority is concealed.

That is in reference to the article itself. Then in the same article, section 8, it says:

That the term "misbranded" as used herein shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design or device regarding such articles or the ingredients or substances contained therein, which shall be false or misleading in any particular and to any food or drug product which is falsely branded, of such territory or country in which it is manufactured or produced.

So you will see what the purpose of Congress was, that no one who is desirous of knowing what the law is in that regard may make any mistake about it. The law requires the manufacturer to be honest in his statement of the contents of the package; it requires him to be honest in stating the truth upon the labels put upon it. That is all there is to the act. That is what the act is intended to accomplish, and which, if properly enforced, in my judgment, will accomplish.

It is the duty of you and of this court to obey the law and to enforce it; to enforce this statute as you would enforce every other statute. But it is not out of place for me to say here, that in the judgment of the Court, no act of Congress has been passed in recent years of more importance than this one.

In dealing in foodstuffs, the seller should, and ought to know, what he is selling, and, on the other hand, the buyer should know what he is buying.

This statute is not to be evaded by a mere subterfuge. It is to be enforced according to its letter and its spirit, and when that is done no one suffers by it.

Now I have said that much in reference to this statute because, as it has been said, it is a recent statute and it may be proper that the statute should be given a fair interpretation, and I repeat that the statute is so plain as to the purpose and intent of Congress that there is no excuse for its violation.

[5] There were three separate informations filed against this defendant in this court. They are numbered respectively 5394, 5427 and 5400. You are to consider only the two, 5427 and 5394. 5400, as I will direct you, is not supported by the testimony in this case, because the witness that was here from Oklahoma was not sufficiently able to state with positiveness that the article that the inspector found in his store was in the shipment made in 1907 or in 1906; and upon that information (the only count of which is for misbranding), you will be directed to find a verdict of not guilty. Let us see what, in effect, the remaining two are:

If they had been filed at the same time it would have been perfectly proper for the United States attorney to have included in one information each of the counts that are embraced in these two; but they were filed at different times, and hence, when the cases were called they were consolidated for the purpose of trial. There is no question about the shipments; no question about them having been sent from here to the places mentioned; that is all supported and agreed upon. The first count, No. 5427, charges that shipment was made by this defendant from the City of St. Louis, of articles for sale in interstate commerce

then and there labeled "Puritan Brand Flavor of Lemon for flavoring ice cream, pastry, etc. Edw. Westen Tea & Spice Co. of St. Louis" (band around the

neck labeled "Strictly Pure"), which bottle was part of a larger consignment consisting of one box of bottled extracts shipped by Westen & Company, from St. Louis, to M. M. Smith, Holdenville, Indian Territory; that the contents of said bottle were adulterated, in violation of the act of Congress of June 30th, 1906; that said bottle contained a liquid which was not flavor of lemon; that true and genuine flavor of lemon, or lemon extract, is a solution of not less than 5 per cent by volume of oil of lemon in grain alcohol; and that the liquid contained in said bottle contained no oil of lemon; that another substance, to-wit: a highly diluted alcoholic solution of citral had been substituted wholly for the article, all of which was to the defendant well known.

That is the first charge in the first count of this information, and the second count charges that the article was misbranded. You have in the first count the allegation and charge that this was an adulteration within the meaning of the statute. The second count charges that it was misbranded.

The other information charges substantially the same thing, only that it was shipped to a different person, in Kansas, instead of the Indian Territory, and the charge in the first count of this information is as to the same article—

That the contents of said bottle were adulterated in violation of the act of Congress of June 30th, 1906, in this, that the said bottle contained a liquid which was not pure lemon flavor; that true and genuine lemon flavor, or lemon extract, is a solution of not less than five per cent (5%) by volume of oil of lemon in grain alcohol and that the liquid contained in said bottle contained about two-tenths of one per cent by volume of oil of lemon, and that another substance, to-wit: a two-tenths of one per cent solution of oil of lemon has been substituted wholly for the article and that other substances had been mixed and packed with the liquid contained in said bottle, so as to reduce and lower and injuriously affect its quality and strength.

That is the first count of that. The second count is for misbranding, charging that this article so sent was misbranded by calling it a "Superior Quality of Wyandotte Pure Lemon Flavor for flavoring ice cream, pastry," etc.

These are the four counts with which you have to deal. A great deal of testimony has been offered here as to whether the words "lemon extract" and "lemon flavor" are used in the trade as synonymous terms. It is not my purpose to comment upon that testimony, although I have a right to do so. I prefer not to do so. I propose to submit these questions to you as business men and as intelligent men, able to judge well as the court, the value of the testimony that has been given here before you. It is for you to determine from the evidence whether or not the terms "lemon flavor" and "lemon extract" are synonymous and mean one and the same thing. [6] The contention of the Government is that "lemon extract" and "lemon flavor" both mean the same article, while the defendant contends that they do not. It is for you to determine whether by "lemon extract" and by "lemon flavor" is meant the same thing in the business world—in the trade, and whether or not the brand upon this bottle of "lemon flavor" would indicate to the purchaser that it was an article like or equivalent to "lemon extract."

This statute imposes a penalty for its violation and to that extent is what we call a criminal proceeding against this defendant. In this case, as in all cases of a criminal character, the defendant is entitled to the benefit of any reasonable doubt arising in the minds of the jurors touching the inquiry that they have in hand. By a reasonable doubt is meant not a mere suspicion, but a doubt, arising from the

evidence in the case, that would lead you to have a doubt as to whether or not the party is guilty of the offense as charged, and I may give in that connection an instruction that is asked by the defendant, to-wit:

The court instructs the jury that it is the duty of the Government to satisfy them beyond a reasonable doubt, of all the facts necessary to convict the defendant, on each and every count, of each and every information; and if, in respect to any of said counts the jury entertain a reasonable doubt, it will be their duty on such count to return a verdict in favor of the defendant.

The court does not mean, however, that such doubt may be a mere suspicion of doubt or a mere conjecture, but if the evidence fairly leaves the jury in a state of uncertainty as to the guilt of the defendant on any of the counts, they should return a verdict thereon of not guilty.

You have heard the testimony of various witnesses as to what the rule was that obtained prior to the passage of the pure food law. Some witnesses have said that before the passage of that act there was no difference, to the trade, between the words "extract" and "flavor"—that they were used synonymously; that since the pure food act was passed there has arisen some question as to whether a diluted extract of lemon may be considered a flavor—whether a per cent less than five would still make a lemon flavor. All of these matters I submit to you. You have seen the witnesses on the stand and you have observed their manner and demeanor. If you think any one has sworn falsely, you are at liberty to discredit the entire testimony of such a witness.

The marshal will have a form of formal verdict prepared by the clerk, for your consideration. I may also say, and I should have said at the time, that the hearing had before the Secretary of Agriculture, or before the officer of the Department of Agriculture as to whether there was any adulteration of this product, or misbranding, is not to be considered as any evidence whatever against this defendant. I have only mentioned the law as providing certain things to be done, and certain things that the Secretary must do, after he in his own mind is satisfied, but none of those things has any binding effect upon you or the defendant here in this trial. I may also say that no regulation (if there be such a regulation) made by any officer of the Government, is binding upon the defendant. You are to determine this case from the facts as charged in the information, as to what was understood in the trade and commerce of the meaning of these two terms.

UNITED STATES v. 50 CANS OF PRESERVED WHOLE EGGS.

(District Court, S. D. Illinois, December 10, 1909.)

N. J. No. 508.

Preserved whole eggs containing approximately 2 per cent of boric acid *held* adulterated within the meaning of paragraph 5 of section 7 of the Food and Drugs Act, in the case of food, in that they contained an added deleterious ingredient which might render such article injurious to health.¹

Libel under section 10 of the Food and Drugs Act. Jury trial waived. Decree of condemnation and forfeiture.

¹ Affirmed, *Hipolite Egg Co. v. United States*, p. 378, *post*.

DECREE OF THE COURT.

HUMPHREY, *District Judge*. This cause having regularly come on to be heard on the 10th day of December, A. D. 1909, at the city of Peoria, and it appearing to the court that in accordance with the prayer of the libel filed herein, the United States marshal for the Southern District of Illinois, under the authority of a writ of monition duly issued, seized upon the premises of Thomas and Clarke, a corporation, [2] doing business in the city of Peoria, State of Illinois, 52 cans of preserved whole egg, prepared by the Hipolite Egg Company of St. Louis, Mo., and thereupon gave due notice of said seizure and publicly advertised the same as required by law in such cases, and has since held in his custody said preserved egg so seized, and the said Thomas and Clarke having entered its appearance specially and having waived all right and title to said seized egg, and having consented that the Hipolite Egg Company might appear as the claimant and defend both in its own right as well as in behalf of the said Thomas and Clarke, and the said claimant having filed its answer and issue having been joined, and the libelant appearing by W. A. Northcott, United States attorney, and Henry A. Converse, assistant United States attorney, and the claimant appearing by Thomas E. Lannen, esq., and all parties interested having first stipulated in writing that the cause might be tried by the court without the intervention of a jury, and the evidence having been presented and the argument of counsel heard, the court finds:

That said preserved whole egg is a food product intended for the consumption of human beings.

That said food product was shipped from the city of St. Louis, in the State of Missouri, to the city of Peoria, in the State of Illinois, and remained within this jurisdiction unsold, and in the original and unbroken package.

That said food product is adulterated within the meaning of the act of June 30, 1906 (34 Statutes at Large, 771), in that it contains 2 per cent of boric acid added as a preservative.

That said boric acid is a deleterious ingredient which may render said article of food injurious to health.

That said food product is illegally held within the jurisdiction of this court and is confiscable and liable to condemnation as provided by said act of June 30, 1906.

Now, therefore, it is ordered, adjudged and decreed, that 30 days after the filing of this decree, the United States marshal shall take said 52 cans of preserved whole egg and totally destroy the same and that judgment be entered against the claimant for the costs in said case and execution issue therefor, and that the United States marshal shall make due report of how he has executed this order of this court, and shall report his bill of costs for said seizure, drayage, storage, advertising, destruction and all other necessary expenses incurred by him in and about said seizure, which said costs of the United States marshal shall be included in the court costs of this case.

The court also made the following special finding as to the facts in the case:

Now on this day come again the parties hereto by their respective attorneys and this cause now being submitted to the court upon the

pleadings and proof adduced the court finds the facts in this cause as follows:

SPECIAL FINDING OF FACTS.

The court finds the facts to be:

1. This libel is filed by the United States of America in its own right and prays seizure for condemnation of certain articles of food contained in 50 cans, more or less, purported and represented to be "Preserved Whole Egg" as hereinafter particularly set forth, in accordance with the act of Congress [3] approved June 30, 1906, and more commonly known as the Food and Drugs Act. This proceeding is brought under section 10 of said act.

2. The court finds that on or about May 14, 1908, Thomas & Clarke, an Illinois corporation, with its place of business in the city of Peoria in this district and engaged in the business of conducting a so-called crackers bakery in said city, entered into a written contract with the Hipolite Egg Company, a Missouri corporation, doing business in St. Louis, Mo.; by the terms of which contract the Hipolite Egg Company was to put up and preserve a certain quantity of preserved whole egg.

3. Under the terms of this contract the Hipolite Egg Company prepared the eggs in question in this suit and on or about the 21st day of May, 1908, placed said eggs in a cold storage warehouse at St. Louis, Mo., in the name of Thomas & Clarke, and a warehouse receipt covering said eggs was issued to Thomas & Clarke and forwarded to them by the Hipolite Egg Company, together with an invoice for the contract price of said eggs. Thereafter, on or about June 1, 1908, Thomas & Clarke paid said invoice to the Hipolite Egg Company.

4. In the early part of November, 1908, Thomas & Clarke sent a written order on the warehouse where said eggs were stored to the Hipolite Egg Company for the eggs in question to be delivered to Hipolite Egg Company for shipment to Thomas & Clarke. Hipolite Egg Company thereupon presented said order to the warehouse and obtained said eggs and delivered same to a common carrier for shipment to Thomas & Clarke, at Peoria, Ill.

5. Thomas & Clarke paid all storage charges on said eggs while in storage at St. Louis as aforesaid. Thomas & Clarke also took out insurance in its own name on said eggs while in storage at St. Louis as aforesaid, and paid all premiums thereon. Thomas & Clarke also paid the freight on said eggs from St. Louis to Peoria. Hipolite Egg Company received no extra compensation for taking said eggs from the warehouse and delivering same to the common carrier.

6. The court finds that said eggs were transported from St. Louis, State of Missouri, to Peoria, in the State of Illinois, as aforesaid and were received by Thomas & Clarke at Peoria on or about November 16, 1908.

7. The said shipment consisted of 130 cans, each can containing about 42 pounds of eggs. Each can was a separate sealed package. The eggs in the cans were whole eggs, minus the shells, that had been broken out of the shells into these cans.

8. The court finds that the said eggs were an article of food and contained added to it a deleterious ingredient known as boric acid which may render such article injurious to health, and that the said

eggs were in fact injurious to health, and the court further finds that the amount of boric acid contained in said eggs was approximately 2 per cent. And the court finds that said eggs were adulterated within the meaning of the act of June 30, 1906.

9. Thomas & Clarke did not know at the time of shipment that said eggs contained boric acid. At the time of making said contract Thomas & Clarke did not know by what process Hipolite Egg Company would preserve said eggs, but did know that the eggs were to be preserved by having added thereto some kind of a preservative, in addition to being sealed in air-tight cans.

10. At the time of the seizure of said eggs they were stored in the storeroom of Thomas & Clarke in their bakery factory at Peoria, along with their bakery supplies. About 80 cans of said shipment had been used by opening said cans and pouring said eggs into a mixture of flour and other ingredients and thereby making a dough. This dough was baked into pastry, such as vanilla wafers, and this pastry was sold to the public. The 50 cans of eggs more or less, seized by the marshal were intended and about to be used for baking purposes as aforesaid at the time of seizure, and said eggs were not intended to be sold as eggs in the original unbroken packages, or otherwise, but were to be used only as above set forth and were transported as aforesaid only for such purpose, but at the time of seizure said eggs were in unbroken original packages, as originally shipped and were then on the premises of Thomas and Clarke unsold.

The Hipolite Egg Company, claimant, sued out a writ of error and also appealed from the aforesaid decree to the Supreme Court of the United States on the ground that the trial court was without jurisdiction in the case. The jurisdictional questions involved are set forth in the trial court's certificate, which is as follows:

CERTIFICATE OF JURISDICTIONAL QUESTIONS.

The District Court of the United States for the Southern District of Illinois hereby certifies to the Supreme Court of the United States that on the 18th day of December, A. D. 1909, a decree was entered in the above entitled cause confiscating said 50 cans more or less of preserved whole eggs and assessing the costs of said case against Hipolite Egg Company, claimant in the above entitled cause.

And this court further certifies that in said cause the jurisdiction of this court is in issue; and that said question of jurisdiction was raised in the following manner:

1. The libel in this case was a proceeding in rem under section 10 of the act of June 30, 1906 (34 Stat. 771), against 50 cans more or less of preserved whole egg, the libel alleging that said eggs were transported in interstate commerce from St. Louis, Mo., to Peoria, Ill., and were adulterated within the meaning of said act.

2. It appeared from the evidence on the part of the libelant on the trial of this cause that said eggs before the shipment alleged in the libel had been stored in a warehouse in St. Louis, Mo., for about five months, during all of which time the said eggs were the property of and owned by Thomas & Clarke, an Illinois corporation engaged in the bakery business at Peoria, Ill., in this district.

3. On or about November 1, 1909, Thomas & Clarke procured the shipment of these eggs from St. Louis, Mo., to themselves at Peoria, Ill.; and upon receipt of said eggs Thomas & Clarke placed the shipment in their store room in their bakery factory at Peoria along with their other bakery supplies.

4. These eggs were intended for use by Thomas & Clarke for baking purposes, and were not intended for sale by them in the original unbroken packages or otherwise, and were not so sold.

5. Hipolite Egg Company, a corporation of Missouri, appeared as claimant of said eggs and intervened and filed an answer to said libel and defended this case, but did not enter into any stipulation to pay the costs of this case.

6. Upon the close of libellant's evidence and again at the close of all the evidence counsel for claimant moved the court to dismiss said libel on the ground that it appeared from the evidence that this court as a Federal court had no jurisdiction to proceed against or confiscate said eggs, because said eggs were not shipped in interstate commerce for sale within the meaning of section 10 of said Food and Drugs Act, and for the further reason that the evidence showed that said shipment of eggs had passed out of interstate commerce before the seizure of said eggs in this case, because it appeared that said eggs had been delivered to Thomas & Clarke and were not intended to be sold by them in the original unbroken packages or otherwise.

7. This court overruled said motions, to which rulings counsel for claimant then and there duly excepted, and this court then proceeded to hear and determine said cause and entered a decree finding said eggs adulterated and confiscating the same and assessing the costs of this case against the claimant, Hipolite Egg Company.

8. Counsel for claimant excepted to the rendition and entry of said decree on the ground that this court is without jurisdiction in rem over the subject matter and on the further ground that this court is without jurisdiction to enter a judgment in personam against said claimant Hipolite Egg Company for costs of said case as aforesaid.

And this court therefore certifies to the Supreme Court of the United States the following questions of jurisdiction raised as aforesaid:

First: The question of whether this court had jurisdiction in rem over said eggs transported as aforesaid.

Second: The question of whether this court had jurisdiction to render and enter a decree for costs against the claimant, Hipolite Egg Company, in personam.

UNITED STATES v. JOHN A. TOLMAN & CO.

(District Court, N. D. Illinois, December 23, 1909.)

N. J. No. 271.

An article of food labeled "Topmost Cane and Maple Syrup. This syrup is composed of the following ingredients and none other: Cane Syrup 60%, Maple Syrup 40%," held misbranded because such article contained little, if any, maple syrup.

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty. Motion for new trial and in arrest of judgment. Overruled.

[1] LANDIS, *District Judge* (charge to the jury). This is a case which is governed by the rules of the criminal law. The paper filed by the United States formally charging the offense against the defendant is not an indictment; it is called an information. But the rule which guides you, which you must observe, is the same rule that would be in force if, instead of an information, it were a grand jury indictment. Now, in this case, it is by this rule of the criminal law that it devolves upon the United States to establish this charge against the defendant [2] beyond all reasonable doubt as distinguished from establishing the charge by the preponderance of the evidence, as has been the rule in some civil cases which you gentlemen have served in. You will recall that in a civil case the court instructed you as to the rule governing in that case, namely, that that side in the litigation which had the greater weight of the evidence was entitled to your verdict. Not so here.

Now, by this expression of reasonable doubt is meant such a state of mind on the part of the jurors, and each juror, where that juror may say that he has an abiding conviction of the guilt of the defendant of the offense charged, that is to say, there is no hypothesis consistent with the defendant's innocence that you can reasonably arrive at. If you are in that frame of mind, the guilt of this defendant of this charge has been established beyond a reasonable doubt. It does not mean such a state of mind as a man may work himself up into in an endeavor to find a way out for somebody accused of crime. That is not a reasonable doubt.

Now, at the outset of this proceeding this defendant is presumed to be innocent, just as in the case of an indictment. It is presumed to be innocent of this offense. The making of the charge, the conducting of the inquiry, the analyses made by all of these witnesses prior to this hearing, the filing of the papers in the court, the issuance of the summons—all that counts for nothing as far as the matter of the guilt of the defendant is concerned, the point being that when you take your oaths here as jurors the defendant stands before you as innocent of this charge as you are; that is what the presumption of innocence means. It is not a form nor a conventional expression which has no color nor meaning. It is a real substantial right, a right of such substance that it has to be torn down and destroyed by evidence—evidence of such a character as to put your mind in that state where you may say, as I said before, you have an abiding conviction of the defendant's guilt. Now, it has been said that it is an important case for the United States. It has been said that it is an important case for this defendant—because it has been said there are people away from this court room interested in the outcome of this litigation. You have not anything to do with that—not a thing—with that procession on the sidewalk moving by this building, you have no concern whatever, save only that it may hear that you have answered your obligation under your oaths in this lawsuit between the parties litigant here in this court room. Now, there is the important thing in this situation, and if you discharge that obligation you have discharged your duty, regardless of what the consequences of your verdict may be.

Now, the charge in this case is that this defendant, the John A. Tolman & Company, on the third day of October, nineteen hundred

seven, delivered to the Chicago, Milwaukee and St. Paul Railway Company two packages for transportation over the rails of that company from Chicago, the place of delivery, to Algona, in the State of Iowa; that these packages contained four dozen one-quart oblong tin receptacles filled with a preparation called "Topmost cane and maple syrup," and that to each one of these quart oblong tin receptacles—in plain language, a tin can; you have seen it here—were then and there attached, one upon the front, the other upon the back, labels; which said labels did then and there contain various printed matter; that these labels, that is to say, the one attached to the back of each of these tin receptacles, containing this commodity referred to as "Topmost cane and maple syrup," contained the following statement: "This syrup is composed of the following ingredients, and none other: Cane syrup 60%; maple syrup, 40%. John A. Tolman and Company, Chicago." Then, the charge is in the information that that statement in the label is false and misleading in that the article contained in the tin receptacle contained little, if any, maple syrup. Those portions of the law for an infraction of which the defendant is sued in this case provide that the delivery for shipment of an article of food misbranded for transportation to another State than the point of delivery is prohibited and punishable. The term "misbranded" as related to food means, if the package containing the food product or the label on the package containing the [3] food product, bears any statement, design, or device regarding the ingredients, or the substances therein contained, which statement, design or device shall be false or misleading in any particular, then, in the case of a charge that—a charge involving the food section, there is a misbranding. So, the charge in this case is in substance that the defendant company, on the date named in the information delivered to the St. Paul road for transportation by that company over its road to Algona, to the addresses named in the information, the consignees named in the information, two boxes containing four dozen of these tin receptacles, each of which tin receptacles was misbranded in the respect indicated, namely, that the brands stated 40% maple syrup when, in truth and in fact, the commodity contained little, if any, maple syrup. The defendant pleads not guilty to this charge. And the charge with the plea, raise the issue, as I have stated, that you are to determine and express by your verdict: Did the defendant deliver to the St. Paul road at the time indicated, four dozen of these receptacles contained in these two boxes, consigned as the information states. Now, as to that phase of the inquiry, dealing with the question of the contents of those other receptacles in the two boxes, other than was examined by the chemists, these which it is admitted by the stipulation were found on the shelves of the Algona merchant; I have this to say: You are authorized, if in your judgment the proof justifies it, having in mind the rule of presumption of innocence and reasonable doubt, as I have defined those expressions to you, you are authorized, if you believe the testimony shows a misbranding as to those receptacles referred to specifically in the evidence as having been analyzed, you have a right to infer, and the law authorizes you to infer from that proof as to the contents of the specific receptacles examined and analyzed, that all of the receptacles contained in that two boxes contained the same ingredients and were the same commodity. I say you are authorized to infer that, considering the tes-

timony of the witnesses as to what was contained in this, and all the other evidence in the case, even with no evidence of a specific examination of the other receptacles that went with this receptacle in the box, if you say, if you can say, I have an abiding conviction that the other receptacles in those boxes other than the ones examined contained this same thing, then, on that phase of the case, you have no reasonable doubt, and in determining the question of what is proved here in that regard, as well as in all others, the rule is that in a criminal case, as in a civil case, you bring into the jury box with you your common sense judgment. You take the testimony of the witnesses here and the evidence in this stipulation of facts which the counsel in the case representing the two litigants have agreed to, and subject that testimony to the same kind of judgment that you would subject your important matters away from here to, at your home or in your business, with no purpose save only to answer the question, guilty, or not guilty, as charged here, and, as I said a while ago, without any possible or remote regard to the fact that the United States of America or the defendant considers this a very important lawsuit. This is no more important than any other. Subject the testimony of these witnesses, the testimony of this stipulation, all of it together, to your common sense judgment, to determine you in answering the question whether or not the contents of the receptacle is as charged in the government's information, namely, does it contain little or no maple syrup? The facts in this case are for you and not for me. I have no inclination nor authority to control your determination of a matter of fact. Were I to do that, it would be an invasion of your rights and authority. You can not shift that burden to me, if you want to. It is on your shoulders, and not mine. The law of this case is on me, and it is the law that you must take my word for the law, even though you disagree from me as to the law, even though you may think it is not a good law, that you could write a better law, or there should be no law on this subject. It is this thing here that binds you and me in this lawsuit, and this thing here that must be enforced in this case, if the facts of this case fit this law, no matter what your private view may be.

[4] Now, coming to the question—and there does not seem to be much dispute in this case as far as you are concerned—matters for you to determine. There does not seem to be much dispute in this case to bother your minds, that is to say, dispute between witnesses. The difficulty here, if any there be, is in coming to a conclusion of the evidence of the witnesses introduced on one side, as to whether or not that testimony reads within the meaning of this law, the delivery of a thing containing something that was enclosed in a thing misbranded, bearing a false and misleading brand. In other words, it is difficult, if any there be, in construing or interpreting, or analyzing and concluding whether or not these things come within this law—no dispute between the witnesses. The label, as I stated a while ago, and as you know, contains a statement that the contents, in substance the contents of this parcel contain 40 per cent maple syrup, and, as I said a while ago, this law forbids the placing upon the parcel of a label containing that statement, if it is substantially untrue, or substantially misleading. So, the question for you to decide is whether or not this parcel contained a substance, one of the

ingredients of which was maple syrup, and if so whether that ingredient, maple syrup, constitutes 40 per cent of the commodity. That is the question for you to determine. And on that question you have had here the testimony of chemists, and I say to you in this kind of a case I suppose that that is about the best testimony we can get. I suppose you probably cannot take that can and determine the contents, the ingredients of the contents. That is a matter for chemical analysis; and yet you have a right, when you go to your jury room, to open that can and determine by your taste, if under your oaths in accordance with the rules I have laid down, you can do it and are satisfied to do it, you may open that can and by your taste determine this defendant to be not guilty. You have that power under the law, and three experts, nor a hundred experts, can take that power away from you, a power, however, to be exercised having regard to the nature of a function which under our system you here exercise, exercising it with no purpose in the world save only to arrive at the truth of the matter, always bearing that in mind.

Now, the dispute is between this prosecution and this defense as to whether or not there is any way of determining what is meant by the expression, "maple syrup," or "pure maple syrup," or "genuine maple syrup." For the United States the position is that the phrase "maple syrup" used on this label of this defendant is to be understood as meaning to him who put it there, and as having been intended by him to be read by him who saw it there, as meaning the result of boiling down the sap of the hard maple tree to a degree or state of consistency where it would be regarded and called maple syrup, excluding the addition to it of any outside substances, excluding putting into it anything in the way of an adulterate—the product solely of boiling down the sap of the hard maple tree. Now, my own judgment is that it is not a serious question, as you might suppose, having in mind that that is what it means—the product solely of boiling down the hard maple sap. It is my judgment that it isn't very important whether it was boiled down to a point where there was within the resultant product 34 per cent of water or 36 per cent of water, or 40 per cent of water. It might very rationally and reasonably still be called maple syrup. The tests which these witnesses have gone by have been explained to you. One has been called the lead test. What that means the witnesses have told you. I will not undertake to repeat to you what they said to you they had in mind when they talked about that test. The ash test is another way which they explained to you, and that test is as familiar to you as to me.

Now, their testimony is that, subjecting the contents of the can to those two tests, certain facts appeared, which facts have been detailed to you by the several witnesses as to the presence of ash and the condition shown by the lead test, and the witnesses have testified as to the amount of ash necessarily and essentially present in pure maple syrup, and you are dealing here, when you talk about maple syrup, you are dealing with pure maple syrup, as I have defined to you the meaning of maple syrup heretofore [5] in these instructions; and by those tests the reasoning of the witnesses is that the contents of this tin receptacle contain the percentage (and it is a percentage per volume of contents)—the percentage of maple syrup within the can.

I do not know how I can any better explain to you the nature of this charge. It is a new field. There are questions involved which would be more satisfactorily disposed of by the court, after a better opportunity for consideration and reflection than is afforded in the trial of a case, the day after day trial of the case with sessions of the court separated by periods which are largely clogged with other business than the business which calls you here. I have done the best I can in defining to you what the issue is in this case. It is your duty to answer this question: guilty or not guilty, to the best of your ability. If you find for the United States, the form of your verdict will be: we, the jury, find the defendant guilty; if you find for the defendant, the form of your verdict will be: we, the jury, find the defendant not guilty.

UNITED STATES v. CHARLES L. HEINLE SPECIALTY CO.

(District Court, E. D. Pennsylvania, January 4, 1910.)

N. J. No. 389; Circular No. 29, Office of the Solicitor.

Section 9 of the Food and Drugs Act, *held* constitutional.

Information filed by the United States against the Charles L. Heinle Specialty Co., charging violation of section 9 of the Food and Drugs Act, in the making and giving by the defendant of a false guaranty relating to a food product which was alleged to be adulterated and misbranded within the meaning of the act, and which product was shipped in interstate commerce by the dealer to whom the guaranty was given. On demurrer to the information. Overruled. Plea of guilty.

[2]¹ HOLLAND, *District Judge* (overruling demurrer). This is a demurrer filed by the defendant to an information lodged against it by the district attorney for the Eastern District of Pennsylvania for having sold an adulterated and misbranded article of food manufactured by it and in violation of the ninth section of the Pure Food Act of June 30, 1906, executed and delivered a false guaranty to the effect that the merchandise sold was not adulterated or misbranded within the meaning of the act. The dealer to whom [3] this adulterated and misbranded food was sold by the defendant and to whom the false guaranty was given, sold the same in interstate commerce, and upon the discovery by the Government officials that the article was misbranded, it is alleged the dealer who sold the same in interstate commerce established the guaranty of the defendant; whereupon this information was filed.

The defendant's demurrer alleges that the information sets forth no charge or offence for which the defendant can be convicted and punished under the act of Congress, approved June 30, 1906, because the ninth section, upon which the information is based, is unconstitutional. Under the second section of this act the introduction into interstate commerce of adulterated or misbranded foods is prohibited, and any person violating this provision is guilty of a misdemeanor; subject to certain fines and penalties.

¹ Numbers in brackets refer to pages of Notice of Judgment.

The ninth section is as follows:

That no dealer shall be prosecuted under the provisions of this act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this act, designating it. Said guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines and other penalties which would attach, in due course, to the dealer under the provisions of this act.

The defendant in this case is charged in the information with having executed and delivered to the dealer who sold the adulterated and misbranded food in interstate commerce the following guaranty, which is alleged to be false:

We, the vendors of the articles mentioned in the foregoing invoice, hereby guarantee and warrant the same to be in full conformity with the Federal act of June 30th, 1906, known as the "Food and Drugs Act," * * * in that the said articles are not adulterated or misbranded within the meaning of * * * the aforesaid act of Congress.

It is not contended by the defendant that Congress has no constitutional right to prohibit the introduction of adulterated and misbranded foods in interstate commerce, but the claim is that so far as the defendant's connection with the adulterated and misbranded goods was concerned, the entire transaction of manufacturing, selling and delivering by it was consummated within the State, as was the issuance of the false certificate, and as the defendant's connection with the article was entirely within the State, the fact that the certificate indicates that the adulterated and misbranded commodity was intended for interstate commerce can make no difference, because the Federal Courts could have no jurisdiction, whatever the intention of the manufacturer might be, until such goods had been shipped or entered with a common carrier for transportation to another State, or had been started upon such transportation in a continuous route or journey; and cites *Kidd v. Pierson*, 128 U. S. 1.

There is nothing in the act to indicate that there is an effort on the part of Congress to regulate the manufacturing, selling or delivering of any articles of food within the States. The act is intended to prevent adulterated and misbranded foods from being sold in interstate commerce; nothing more, and in order that this may be accomplished it prohibits the party who makes or manufactures the food and who knows what it contains from falsely assuring an innocent purchaser that its quality and dress lawfully entitles him to sell the commodity in interstate commerce. Such a certificate, made by a defendant, expressly under the provisions of the act, if false, could have been made with no purpose other than to defeat the object of the act. This prohibition is [4] obviously essential to the enforcement of one of the important powers with which Congress is intrusted, to wit: the regulation of interstate commerce.

To punish the dealer who sells the article in another State will not in all cases reach the evil sought to be remedied. He may be entirely innocent of any intention of selling an adulterated or misbranded food, because he may be unable to tell the difference between a pure article and one adulterated, and dealers cannot be expected to employ expert chemists to examine the great variety of commodities which enter into commerce and are dealt in by them; but the evil can soon

be cured if the innocent dealer may shift the responsibility for the purity of the commodity to the manufacturer by requiring him to certify to the effect that the article is not adulterated or misbranded, when the manufacturer knows he will be subjected to punishment in case he gives a false certificate prohibited by the act.

In the case of *United States v. Fox*, 95 U. S. 670, 24 L. Ed. 538, in passing upon the provision in the bankrupt law which made it a misdemeanor, punishable by imprisonment, for obtaining goods under false pretence with intent to defraud, within three months of the commencement of bankruptcy proceedings, the court held that as this would be no offence under the act of Congress at the time of the commission of the false pretence, that any subsequent independent act by the party himself or a third party in instituting bankruptcy proceedings, could not make it a crime punishable in the Federal Courts. In the discussion of the question, it was said by Justice Field, that "the criminal intent essential to the commission of a public offence must exist when the act complained of is done; it cannot be imputed to a party from a subsequent independent transaction. There are cases, it is true, where a series of acts are necessary to constitute an offence, one act auxiliary to another in carrying out the criminal design."

In this case, the criminal intent essential to the commission of the offence existed at the time defendant gave the certificate specifying that it was under the pure food act of Congress of June 30, 1906. With what purpose and intent was the certificate given other than for the purpose of evading the provisions of this act of Congress? It is averred defendant made and knew the goods were both adulterated and misbranded, and with this knowledge gave a certificate that they were not adulterated or misbranded in order that an innocent purchaser might sell them in interstate commerce, and, in this case, the purpose of the certificate was accomplished. The dealer did just what the defendant intended he should do, that is, the dealer relying on the certificate sold the articles in another State. "Any act committed with a view of evading the legislation of Congress, passed in the execution of any of its powers, or of fraudulently securing the benefit of such legislation, may properly be made an offence against the United States." *U. S. v. Fox*, supra.

Demurrer overruled.

UNITED STATES v. JOHNSON.

(District Court, W. D. Missouri, W. D., January 8, 1910.)

177 Fed. 313; N. J. No. 266.

A drug represented as a remedy for cancer held not misbranded within the meaning of the Food and Drugs Act by reason of alleged false and misleading statements on the label relative to the therapeutic value of such drug.¹

Indictment charging misbranding in violation of section 2 of the Food and Drugs Act. On motion to quash indictment. Motion sustained.

¹ Affirmed, *United States v. Johnson*, p. 427, *post*.

[314]¹ PHILIPS, *District Judge*. The defendant has filed motion to quash the indictment, for the principal reason that it does not disclose an indictable offense. It is predicated of what is known as the "Pure Food and Drug Act," entitled "An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes." Approved June 30, 1906. Act June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1187). It contains six counts. The first count, in substance, charges that the defendant shipped from one State to another certain articles designated as "Cancerine Tablets," "Antiseptic Tablets," "Blood Purifier," "Special No. 4," "Cancerine No. 17," "Cancerine No. 1," which constituted "Dr. Johnson's Mild Combination Treatment for Cancer." It charges that they were misbranded within the meaning of the act aforesaid, in that the broken packages, etc., of "Cancerine Tablets" were labeled and branded as follows, to wit: "Complies with the Food and Drug Act, June 30, 1906. Cancerine Tablets. Take two tablets in water every three hours during the day. Do not take more than four doses in twenty-four hours. Prepared for and distributed by Dr. O. A. Johnson, 1233 Grand Ave., Kansas City, Mo."—which said label or brand is alleged to be false and misleading in that it bears the name "Cancerine Tablets," which statement, regarding such articles and substances contained therein, is false and misleading, in that it implies that said tablets will cure, and are effective in bringing about the cure of, cancer, which was untrue, and that they were worthless and ineffective for such purpose.

The second count is predicated of packages containing "Blood Purifier," which were misbranded within the meaning of said act, in that they were labeled: "Guaranteed under the Pure Food and Drug Act, June 30, 1906, Serial No. 18131. Contains not more than 20 per cent. Alcohol. Dr. Johnson's Mild Combination Treatment for Cancer. Blood Purifier. This is an effective Tonic and Alterative. It enters the circulation at once, utterly destroying and removing impurities from the blood and entire system. Acts on the Bowels, Kidneys and Skin, eliminating poisons from the system, and when taken in connection with the Mild Combination Treatment gives splendid results in the treatment of cancer and other malignant diseases." This was followed with directions how to take the remedy. The charge is then made that said label was false and misleading in that it bears false statement that said drug is a part of the treatment for [315] cancer, etc., whereby it held out and falsely claimed that said drug is efficacious in the treatment of cancer, etc., when in truth and fact the drug contained in said packages is worthless and ineffective for such purpose.

The third count is predicated of packages under the name of "Blood Purifier," and is in effect the same as the preceding shipment, only to a different party.

The fourth count is predicated of packages and bottles under the name of "Special No. 4" with the label "Dr. Johnson's Mild Combination Treatment for Cancer. Special No. 4," with directions as to how it was to be applied and used, and its effect. This label is charged to be false and misleading in that it would not accomplish the results stated.

¹ Numbers in brackets refer to pages of Federal Reporter.

The fifth count is predicated of shipments of boxes, etc., containing "Cancerine No. 17," with directions as to how the same should be applied and used. The indictment charges that these were false and misleading in that said drug was offered as part of the treatment for cancer, holding out and representing that said drug will cure, and is effective in bringing about the cure of, cancer, when, in fact and in truth, it was not effective for such purpose.

The sixth count is predicated of a shipment of box or carton called "Cancerine No. 1," which is alleged to be misbranded within the meaning of the act, in that the label contained the following: "Dr. Johnson's Mild Combination Treatment for Cancer, Tumor and Other Chronic Diseases. Cancerine No. 1"—with directions as to how the same should be applied and used. Said label or brand is alleged to be false and misleading, in that it bears thereon the name "Cancerine No. 1," statements regarding such articles and substances contained therein which are false and misleading, in that said drug was represented as part of the treatment for cancer, and that it would cure, and is effective in bringing about the cure of, cancer, etc., when, in truth and fact, it is wholly worthless and ineffective for the purposes recommended.

From which it is apparent that no charge is preferred by the indictment that the drug or medicine was adulterated, or that it contained anything that was poisonous or deleterious, or that it contained less than what was represented, or that in any respect there was any misbranding as to the contents and composition thereof. The substantive charge is that the articles manufactured and shipped by the defendant are and were ineffacious in producing the cures and remedies indicated by the label. The question, therefore, to be decided is whether this presents an indictable offense within the provisions of the pure food and drug act.

The very title of the act indicates its scope and purport. Its underlying purpose was to protect the public health against imposition upon the users of food, drugs, and medicines which were adulterated, misbranded, poisonous, or deleterious. To this end, the first section of the act makes it unlawful and an indictable offense "for any person to manufacture * * * any article of food or drug which is adulterated or misbranded, within the meaning of the act."

The second section forbids the introduction into any State, etc., or from any [316] foreign country, or shipment to any foreign country, of any article of food or drug which is adulterated or misbranded within the meaning of the act, etc.

The third section directs that the Secretary of the Treasury, of Agriculture, and of Commerce and Labor, shall make uniform rules and regulations for carrying out the provisions of the act.

The fourth section declares that the examinations of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of such bureau, "for the purpose of determining from such examinations whether such articles are adulterated or misbranded within the meaning of this act."

Section 5 declares the duty of district attorneys, to whom the Secretary of Agriculture shall report any violation of this act.

Section 6 declares that the term "drug," as used in the act, shall include all medicines and preparations recognized in the United

States Pharmacopœia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or animal.

Section 7 then specifies when an article shall be deemed to be adulterated. In case of drugs, if it differs from the standard of strength, quality, or purity, as determined by the test laid down in the United States Pharmacopœia or National Formulary: "Provided, that no drug defined in the United States Pharmacopœia or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality, or purity be plainly stated upon the bottle, box, or other container thereof although the standard may differ from that determined by the test laid down in the United States Pharmacopœia or National Formulary," or if its strength or purity fall below the standard under which it is sold, or any substance has been substituted wholly or in part for the article, or any valuable constituent of the article has been wholly or in part abstracted, or if it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed, or if it contain any added poisonous or other added deleterious ingredient which may render such articles injurious to health (with a certain provision), or if it consist in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, etc.

Section 8 is as follows:

That the term "misbranded," as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

It is conceded that the indictment is predicated of the words contained in the foregoing section 8, "the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular." In other words, the contention is that the label on the bottle or container, as to the curative or remedial effect of the contents, is a [317] misbranding within the meaning of the statute, if, in fact, the prescription be ineffectual for the purpose indicated. This, it seems to me, is an entire misconception of the term "misbranding" as used in the act. The language, "the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular," must be read and interpreted so as to have regard to its context, and is to be restrained by the subject-matter of the act.

Having regard to the intendment of the whole act, which is to protect the public health against adulterated, poisonous, and deleterious foods, drugs, etc., the labeling or branding of the bottle or container, as to the quantity or composition of "the ingredients or substances contained therein which shall be false or misleading," by no possible construction can be extended to an inquiry as to whether or not the prescription be efficacious or worthless to effect the remedy claimed

for it. Premitting any expression of opinion as to how far Congress may go in the direction claimed under this indictment, it is sufficient to say that this legislation, predicated of the commerce clause of the Federal Constitution, it must be conceded, presses the power of the general government close to the confines of limitation.

In the debates in Congress, when this measure was under consideration, it was never sought to be justified except on the ground of protecting the public health, as it might be affected by interstate shipments of food, drugs, etc. At no time was it asserted or pretended that it was proposed to reach the matter of holding the manufacturers and vendors of prescriptive or patented medicines, multitudinous and multiform as they are, to criminal liability for mis-statements as to the curative or remedial effects of the prescription, which would necessarily depend upon the opinions of contending experts and the users of the nostrums.

As this is a criminal statute, creating a new offense, it must be strictly construed and applied. It must be restrained to its expressed, reasonable intendment; otherwise, the courts, by mere construction, may extend its operation far beyond the legislative intent. If it had been the mind of Congress to make it an indictable offense for such manufacturers and vendors by their labels or brandings on bottles and packages to mislead the buyers as to the curative or healing properties of the drugs, as to the mere matter of commendation, apt words, both in the title and body of the act, could and should have been easily employed to indicate such purpose, and not leave it to the courts by strained construction to read it into the statute.

The motion to quash is sustained.

UNITED STATES v. BOECKMANN.

(Circuit Court, E. D. New York, January 15, 1910.)

176 Fed. 382; N. J. No. 269.

A food product labeled "Compound: Pure Comb and Strained Honey and Corn Syrup," held not misbranded merely because the percentage of corn syrup in the compound largely exceeded that of honey.

Indictment charging violation of section 2 of the Food and Drugs Act. On demurrer to indictment. Demurrer sustained.

CHATFIELD, *District Judge*. A demurrer has been interposed to an indictment charging the defendant with having shipped from the State of New York to the State of New Jersey, a certain article of food for man, labeled "Compound: Pure Comb and Strained Honey and Corn Syrup;" that the label was false and misleading, and the contents of the jar misbranded, in that "the said label represented the principal ingredient of the said contents of said glass jar to be pure comb honey" when in fact the contents were "almost wholly glucose and starch sugar, and the said contents of the said glass jar in truth and in fact consisted of a very small percentage of pure comb honey."

It has been called to the attention of the court that under the authority of the statute of June 30, 1906 (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1909, p. 1187]), certain regu-

lations for the guidance of the public, and for carrying out the provisions of the law, have been made by the Secretary of Agriculture, and certain rulings or decisions by the Secretary of Agriculture have construed the language of the Statute. For instance, Food Inspection Decision No. 75 provides that, "When both maple and cane sugars are used in the production of syrup, the label should be varied according to the relative proportion of the ingredients, [383]¹ the name of the sugar present in excess of fifty per cent of the total sugar content, should be given the greater prominence on the label, that is, it should be given first." Also, Food Inspection Decision No. 87 provides that, "Viscous syrup obtained by the incomplete hydrolysis of the starch of sugar" should be labeled "corn syrup with cane flavor," if a small percentage of the product of the cane is added thereto.

There is no charge of any violation of regulations, or refusal to comply with the rulings of the Commissioner of Agriculture, but the case presents an entirely distinct question, depending upon the provisions of the Statute itself.

In the present indictment we have an allegation that the defendant has put upon the market, for interstate commerce, an article which is misbranded, in that the label is misleading, solely because the principal ingredient is alleged to be held out to the public as "pure comb honey," when in reality "glucose and starch sugar" made up almost wholly the actual "principal ingredient."

Under the decision *In re Wilson* (C. C.) 168 Fed. 566, such a label as is recited would not be contrary to fact, and this court agrees in the opinion that it is impossible to say what portion of the label as printed would signify greater percentage of the product.

The demurrer will be sustained.

UNITED STATES v. KNOWLTON DANDERINE COMPANY.

(Circuit Court of Appeals, Fourth Circuit, February 1, 1910.)

175 Fed. 1022; N. J. No. 284.

Certain casks of liquid extracts, shipped from the manufacturing agent in one State to the owner in another State to be prepared for the market, and not for sale in the casks. *held* not subject to seizure under the Food and Drugs Act.

Appeal from the District Court of the United States for the Northern District of West Virginia. Affirmed.²

Before GORF and PRITCHARD, Circuit Judges, and CONNOR, District Judge.

GORF, *Circuit Judge*. The opinion of the court below, which contains a full statement of the facts, is found in 170 Fed. 449. Appellant assigns as error, in substance, that the court below erred in holding that the 65 casks of liquid extracts were not prepared, used or shipped in any manner contrary to the laws of the United States, and that the United States had no right through its officers to seize the said casks or any of them.

¹ Numbers in brackets refer to pages of Federal Reporter.

² For statement of facts and opinions of lower court see *United States v. 65 Casks Liquid Extracts*, p. 199, *ante*.

Under the facts disclosed by the record, we conclude that the court below properly found that, even if there was probable cause for making the seizure and filing the libel, the evidence made it plainly appear that the appellee shipped the said casks as its own product, made by its own agent, from the laboratory of said agent at Detroit, Mich., to the warehouse of the appellees at Wheeling, W. Va.; that said casks of extracts were not intended for sale as shipped, but were to be, at the warehouse mentioned, bottled and labeled as the law requires before being offered for sale. No attempt to evade the law, either directly, indirectly, or by subterfuge, has been shown; it appearing that the manufacturer had simply transferred from one point to another the product he was manufacturing, for the purpose of completing the preparation of the same for the market. Under the circumstances disclosed in this case, having in mind the object of the Congress in enacting the law involved, we do not think the liquid extracts proceeded against should be forfeited. Reaching this conclusion, we do not find it necessary to consider other questions discussed by counsel, and referred to in the opinion of the court below.

We find no error.

Affirmed.

UNITED STATES v. MAYFIELD ET AL.

(District Court, N. D. Alabama, S. D., March 11, 1910.)

177 Fed. 765; N. J. No. 326.

A beverage labeled "Celery Cola" *held* adulterated because it contained cocaine and caffeine, added deleterious ingredients which might render the article injurious to health; and misbranded because the quantity or proportion of cocaine present was not stated on the label.

Information charging violation of section 2 of the Food and Drugs Act. As no service of process was had on J. C. Mayfield, the case against him was not prosecuted. To the information the defendants J. P. Bradley, J. W. Altman, and J. F. Hawkins pleaded not guilty. Jury trial. Verdict of guilty as to J. F. Hawkins and J. W. Altman, and a verdict of not guilty as to J. P. Bradley.

[766]¹ GRUBB, *District Judge* (charging jury). The defendants in this case are charged with having violated certain provisions of what is known as the "Food and Drugs Act," an act passed by Congress in 1906 (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1909, p. 1187]), the purpose of which was to protect consumers against impure and adulterated foods and drugs and also against the use of foods or drugs which do not show what they contain by the brands on the package. Congress did not have any power to make this law concerning matters relating to commerce entirely within one State, but only as to commerce between one State and another State. The States themselves have the exclusive power to regulate their own internal commerce. So the prohibition of this act is directed only against the introduction into interstate commerce of any article of food or drink, or of any drug, either adulterated or misbranded. These two acts—adulteration and misbranding—are made

¹ Numbers in brackets refer to pages of Federal Reporter.

offenses when they occur in an article which is introduced into interstate commerce. Now, you will see that the first proposition in this case will be whether or not this shipment was one of an interstate character. This proposition is simplified for your consideration, however, by the admission that this particular jug, which is made the subject of this prosecution, was shipped from Birmingham, Ala., to New Orleans, La. Therefore it is conceded that it was introduced into interstate commerce by some one.

Now, as I say, the prohibition is against the introduction into interstate commerce of any article of food which is either misbranded or adulterated. I charge you that the shipment in this case was a food product within the meaning of the act of Congress.

In order to make out a case under the first count of the information, which charges misbranding, three things would be necessary for you to believe from the evidence, and beyond a reasonable doubt. The first is that there was in the shipment some constituent which should have been, and was not, shown by the brand. The act itself defines what constitutes misbranding in some respects. If the article shipped contains cocaine, and that fact is not indicated by the brand, then the failure to so indicate its presence by the brand is defined to be misbranding. In order to convict on this count, you would have to find that there was cocaine in the jug which went to New Orleans, and that there was nothing on the jug which indicated that it contained cocaine, and that the defendants or some one or more of them were responsible for the introduction of that jug into interstate commerce. These three things you would have to be convinced of beyond a reasonable doubt to convict under the first count of this information.

Now as to the presence of cocaine in this liquid there seems to be little dispute. The Government experts testified that it was there, and there is no contradiction of this fact by the defendants. Therefore, if the testimony of the Government experts convinces you beyond a reasonable doubt of the [767] presence of cocaine in this liquid—and you have no right to reject their testimony capriciously and without good cause—this fact is sufficiently established. It is conceded that this jug had no brand upon it indicating the presence of cocaine in the liquid in the jug.

Then, the next proposition for you to consider is whether or not these defendants were responsible for the introduction of this shipment into interstate commerce. It is admitted that this jug was introduced into interstate commerce by some one. The evidence shows that the order on which the jug was shipped was received by the Birmingham Celery Cola Company, and by it filled by shipping the jug from Birmingham to New Orleans. Clearly the Birmingham Celery Cola Company primarily introduced this shipment into interstate commerce. The corporation, however, is not informed against in this prosecution. A corporation acts only by agents. The law is that, if any agent does an illegal act on behalf of his principal, he makes not only the principal liable for his act, but himself as well. An agent cannot shift the responsibility for wrongdoing altogether from his own shoulders onto those of his principal. If the act was illegal, the manager who filled the order and shipped the stuff would be responsible, even though his responsibility was shared by his principal. The manager is not informed against in this prosecution, however. The men who are informed against are stockholders and officers of

the company. So far as the mere fact of their being officers and stockholders in the corporation is concerned, I charge you that it does not make them responsible in this prosecution; but their responsibility depends altogether upon whether or not they conferred on the manager the authority to ship Celery Cola from one State into another; and whether the shipment upon which this prosecution is based was made by the manager pursuant to the authority so conferred.

The question for you to inquire into is whether or not the defendants are shown by the evidence, to your satisfaction, to have given the manager the authority to do what he did in shipping this Celery Cola out of Birmingham to New Orleans. If, from the evidence, you are satisfied beyond a reasonable doubt that this authority was conferred upon him by the defendants, then they would be just as responsible as the manager or the Birmingham Celery Cola Company. The evidence tends to show that Celery Cola had been shipped during the time from January 1, 1908, until the date of the shipment on which was based this prosecution, which was some time in October of that year. It also tends to show that, when this company began to get into financial difficulty, the defendants secured the manager to take charge of the plant, operate it and sell its product. That much is conceded by both sides. There is also evidence tending to show that they told the manager expressly to sell the Celery Cola on hand. And I take it that the operation of the plant and the conduct of the business would imply the authority in the manager to sell its product of whatsoever kind. I think that it is to be fairly inferred that the authority conferred on the manager by the defendants was that he carry on the business and dispose of the product as it had been done according to the previous course of business. If the authority of the manager, so conferred, was not expressly restricted to sales made in Alabama, and [768] according to the previous course of business sales had been made to other States, a fair inference would be that the **manager was authorized by defendants to conduct an interstate traffic in Celery Cola.** So, if the previous course of business had been to sell without branding the packages as containing cocaine, a fair inference would be that the manager was authorized by these defendants **to conduct the business without such branding.** The fact that the defendants in their testimony denied knowledge that Celery Cola contained cocaine is evidence that the previous course of business of the company had been to sell it without branding it as containing cocaine. If general authority was conferred on the manager by the defendants to sell Celery Cola, when he took charge, it would not be necessary that express authority be given him to fill each order. Until the authority was revoked, it would cover all shipments without renewal on the occasion of each shipment.

The Celery Cola extract was manufactured in St. Louis and shipped by the manufacturers to the company of which defendants were officers at Birmingham. The extract was shipped in barrels; each barrel stamped with the guaranty, signed by the manufacturer, that the extract was neither misbranded nor adulterated within the meaning of the Food and Drug Act. The Birmingham company mixed the extract with a boiling syrup, composed of sugar and water, in the proportion of one part of the extract to ten parts of the syrup, and it was the syrup, so compounded, that was shipped by the Birmingham company in the conduct of its business. The defendants

testified that they had no knowledge, during the time the Birmingham company handled the extract, that it contained either cocaine or caffeine, in any quantities, and rely on the ninth section of the act, which excuses the dealer, who buys the article from a manufacturer with the guaranty from him that the article is neither misbranded nor adulterated within the meaning of the Food and Drug Act. Proof of the absence of knowledge on the dealer's part that the article is obnoxious to some of the provisions of the act is only a defense when the article is purchased from a manufacturer, and a guaranty taken from the manufacturer that it complies with the requirements of the act. The second section of the act prohibits the introduction into interstate commerce of any article of food, or drugs, which is adulterated or misbranded. The ninth section provides that no dealer shall be prosecuted under the provisions of the act, when he can establish a guaranty, signed by the manufacturer from whom he purchased such articles, to the effect that the same article is not adulterated or misbranded within the meaning of the act; in which case, the manufacturer shall be amenable to the prosecutions, fines, and other penalties, which would otherwise attach to the dealer. The purpose of Congress was to place liability for the violation of the law upon some one in each instance. Primarily the liability is on the dealer who introduces the article into interstate commerce. The liability can be shifted from the dealer only by imposing the same liability upon the manufacturer. This can be done only by virtue of the manufacturer's guaranty to the dealer. If, for any reason, the guaranty is insufficient to impose liability upon the manufacturer, it remains where it primarily rested—upon the dealer. To have the effect of releasing the dealer from liability for the violation of the act, complained of in this [769] prosecution, the guaranty must be of a character to impose liability for the same violation upon the manufacturer, if he were substituted for these defendants in this case; otherwise, both parties would escape liability, and the purpose expressed by Congress be defeated. The act says that the manufacturer who signs the guaranty shall be subject to the same prosecution and penalties as the dealer. If a conviction could not be sustained against the manufacturer upon its guaranty, if substituted for the defendants in this case, then the taking of the guaranty by defendants would be no defense to their violation of the law in reference to the shipment in question, though they had no knowledge that it was adulterated or misbranded. In order for the manufacturer's guaranty to be effective to impose any liability upon him for any violation of law as to the article, which is the basis of this prosecution, the guaranty must relate to the identical article introduced into interstate commerce by the defendants as dealers. Otherwise the answer of the manufacturer to the prosecution would be that he had never guaranteed the article shipped by the dealer, and the answer would be complete. Change of the original package might not constitute a change of identity. In this case there was more. The manufacturer furnished the dealer with the extract, and the dealer shipped the syrup. Commercially, if not chemically, the two were different. The extract was a mere constituent of the syrup, and not the syrup itself. The manufacturer did not guarantee the article shipped by the dealer and on which this prosecution is based; could not be convicted for the violation of the act, charged against the defendants in

relation to it, by reason of the guaranty, and for that reason the taking of the guaranty was not a protection to the defendants. When they changed the identity of the extract, they elected to abandon the protection of the manufacturer's guaranty, and were responsible for the character of the new article, the syrup, made and shipped by them, or under their authority. Neither the defendants' want of knowledge of the presence of cocaine in the extract, nor the guaranty taken by them from the manufacturer, would excuse their failure to properly brand the jug, under this count of the information.

The second count of the information charges the defendants with having introduced into interstate commerce an article containing a deleterious ingredient, injurious to health, viz, cocaine; and the third count relies in the same way upon an article alleged to contain caffeine. These counts are based upon adulteration, the statutory definition of which is the adding to a food product of a deleterious ingredient, injurious to health. The same principles as to the responsibility of these defendants for the acts of their manager, and with reference to the effect of the guaranty taken by them from the manufacturer, stated as relating to the first count, apply as well to the second and third counts. In order to convict on these counts, the jury must find further from the evidence, with the degree of certainty required in criminal cases, in the first place, that the Celery Cola shipped to New Orleans contained cocaine or caffeine, under the respective counts, and then that either or both was deleterious and injurious to health. The presence of each of these substances in appreciable quantities in the jug of Celery Cola in question, is testified to by the [770] Government chemists, and is not disputed by any evidence offered by the defendants. You are the exclusive judges of the credibility of witnesses, but it would not be proper for you to capriciously reject testimony which is uncontradicted in the case.

If you determine the presence of either or both of these substances in the shipment in question, it would then become your duty to determine from the evidence whether either or both, as used in Celery Cola, were injurious to health. As Celery Cola is intended for a beverage and not a drug, you would have the right in determining this question to consider the injury from the probable frequent and repeated use of the article as a beverage, rather than its rare and occasional use as a drug. You have heard the evidence of the Government witnesses, who are physicians, as to their opinion concerning the injurious qualities of both of these substances, in the quantities found in Celery Cola, when used as frequently as beverages are likely to be used. The defendants introduced no evidence to contradict that offered by the Government. You are also the exclusive judges of its credibility, but should not, without good reason, disregard evidence not contradicted.

It is your duty to take the law of the case from the court, as it has been given to you in this charge. Though your opinion might be that the law imposes a hardship upon these defendants in holding them responsible for the contents of an extract of which they were ignorant, and which they had purchased with a guaranty from the manufacturer; this opinion, if you entertain it, should not operate to prevent a conviction in this case, if you are satisfied beyond a reasonable doubt of the facts necessary to constitute the offense, as I have defined it. If not so satisfied, it would be your duty to acquit the

defendants, and the importance of the enforcement of the law should have no weight as against such a conclusion. The enforcement of no law is of sufficient importance to justify a conviction, except upon such evidence.

If you are satisfied to the degree required that the defendants are guilty of misbranding the jug of Celery Cola, exhibited to you, it would be your duty to find them guilty, under the first count of the information. If you are satisfied that they are guilty of adulterating it with cocaine or caffen, then it would be your duty to find them guilty under the second or third counts respectively, or both. If you are not so satisfied of their guilt in misbranding or adulterating the Celery Cola, which is the basis of the prosecution, then you should acquit them.

UNITED STATES v. SCHURMAN ET AL.

(District Court, W. D. Michigan, S. D., March 24, 1910.)

177 Fed. 581.

A food product contained in packages labeled "Genuine Dutch Tea Rusk, made in Holland, Mich., by the Michigan Tea Rusk Company, Holland, Mich.," held to present a doubtful case of misbranding as purporting the article to be of foreign manufacture.

Application by the United States District Attorney for leave to file an information against George Schurman and others for alleged violations of the Food and Drugs Act. Denied.

DENISON, *District Judge*. The district attorney presents a sworn information, accompanied by affidavits, supposed to show a violation of the pure food act of June 30, 1906. It appears that the respondents are engaged in business at the city of Holland, in this district, manufacturing and shipping to different States an article of food called "Dutch Tea Rusk." The point of the complaint must be that the article is misbranded, because so "labeled or branded as to deceive or mislead the purchaser, or purport to be a foreign product when not so" (section 8, foods, second); and this conclusion is based on the fact that respondents mark their packages as containing "Genuine Dutch Tea Rusk," and say that it is "made in Holland, Mich., by the Michigan Tea Rusk Company, Holland, Mich.," having the word "Holland," where it first occurs, in type so large and prominent as to hold the attention and thus mislead purchasers into supposing that the article is a genuine importation from the country of Holland.

Obviously, a jury could not be affirmatively instructed that these [582] markings did constitute a violation of the statute. Such tea rusk are largely used in the Netherlands, are popular among Hollanders, are manufactured in this State in a community that is largely made up of Netherlanders, and doubtless find their chief market in different parts of this country among people of the same nationality. The respondents have a perfect right to call their product "Dutch Tea Rusk." This is no more misleading than to speak of English muffins, or French rolls, or German fried potatoes. If the article, in composition and manufacture, is identical with a similar article made

in the Netherlands, it is, in one sense, "genuine." Whether the word "genuine" is here used in a true or in a misleading sense depends on the inferences to be drawn from all the circumstances. The undue prominence given to the name "Holland" would tend to strengthen the inference that a misleading was intended; but this inference would be only argumentative, and the most that can be said for the case made against the respondents is that it probably would require a submission to the jury, and that the jury would be quite at liberty to find that the article did not "purport to be a foreign product."

The motion papers also show that, at a hearing held under the rules of the Department of Agriculture, the respondents made a full statement of the circumstances, insisting that these markings were not misleading, but offering, if the department should think otherwise, immediately to change the labels as might be directed by the department. So far as the motion papers show, the conclusion of the department that the label was improper has been in no way communicated to the respondents, nor have they been informed what changes, if any, the department would require. In case of a clear violation of the statute, there is no occasion for such notice or opportunity to make a change in the label; but in a case like this, where the violation is doubtful, and where the respondents seem to have acted in good faith in being willing to comply with the law and the rules, if they could find out what the law and the rules were, it is extremely improbable that any jury would find, beyond a reasonable doubt, the existence of the essential misleading, and, upon the same principle which requires a grand jury not to indict unless it is reasonably probable that a conviction might follow, this information should not be filed.

The application will be denied, with leave to renew the same at any time upon a further showing that after notice from the department of its conclusion, or after knowledge of this disposition of this motion, the respondents did continue or shall continue to use the word "genuine" upon their labels or to give undue prominence to the word "Holland."

UNITED STATES v. 420 SACKS OF FLOUR.

(District Court, E. D. Louisiana, March 29, 1910.)

180 Fed., 518; N. J. No. 382.

Flour bleached by the "Alsop Process" held adulterated as a result of such bleaching; and misbranded because it was labeled "High Patent Flour" when it was not of such grade.

Libel under section 10 of the Food and Drugs Act. On exceptions to the libel. Exceptions overruled. Cause heard *ex parte*. Decree of condemnation and forfeiture.

FOSTER, *District Judge* (overruling exception to libel). In this case a libel was filed by the United States against 420 sacks of flour alleged to have been brought into Louisiana by interstate shipment from Kansas, in violation of the pure food and drugs act. (Act June 30, 1906, c. 3915, 34 Stat., 768 [U. S. Comp. St. Supp. 1909, p. 1187]).

The Aetna Mill and Elevator Company has claimed the flour and filed exceptions to the libel on the following grounds:

First. That the Food and Drugs Act, June 30, 1906, under the authority of which the libelant herein instituted these proceedings, is wholly invalid, unconstitutional, and void, in that said act in terms and by intentment is in violation of Article 1, Section 8, Paragraph 3, of the Constitution of the United States, and is in further violation of so much of Article 5 of the amendments to the Constitution of the United States as prescribes that no person shall be deprived of life, liberty or property without due process of law; and is further in violation of Article 10 of the amendments to the Constitution of the United States.

Second. That the said act, known as the Food and Drugs Act, June 30, 1906, is wholly illegal and void by reason of the fact that it is uncertain and indefinite, and that said uncertainty and indefiniteness apply to the whole of said law, and particularly in this: That the law itself does not define any standard of grade, quality, or purity, and in this regard delegates legislative functions to the court clothed with jurisdiction of cases of a civil or criminal nature brought under this law.

It is urged by claimant that Congress intended to enact, and in fact has enacted, a police regulation, and that, having such intention, the power vested in Congress to regulate interstate commerce is [519]¹ insufficient to validate the act.

I can not agree with this contention. To my mind it is immaterial what the intention of Congress was, if it had the power to enact the legislation. That it did so have, I consider well settled. In the Lottery case, 23 Sup. Ct. 321, 47 L. Ed. 492, 188 U. S. 321, the Supreme Court upheld the validity of the law prohibiting the sending of lottery tickets from one State to another, and reasoning by analogy, it seems perfectly clear that Congress can prohibit the shipment in interstate commerce of food that has been adulterated, or labeled so as to defraud or mislead the public.

The second contention I consider equally without merit. While the act is necessarily broad in its terms, the courts can well protect the rights of parties in each particular case by requiring specific and properly drawn pleadings.

The exceptions must therefore be overruled.

The claimant thereupon asserted its intention to take appeal from the ruling of the court and declared in open court by its proctors no answer would be made by it to the libel. Thereupon, after the delays allowed by law had elapsed, the court pronounced the claimant in contumacy and default, adjudged the libel to be taken pro confesso, and proceeded to hear the cause ex parte. A commissioner was duly appointed, before whom the United States of America, libelant, presented its testimony. After the testimony was duly reported, the court rendered its decree of condemnation and forfeiture in form and substance as follows:

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA.

UNITED STATES OF AMERICA, *Libelant*,

v.

No. 14173.

420 SACKS, ET AL. OF FLOUR.

This cause came on before me for hearing on the 19th day of February, 1910.

Messrs. Pierce Butler, Assistant Attorney General of the United States, and Charlton R. Beattie, United States district attorney, appeared for libelant.

¹ Numbers in brackets refer to pages of Federal Reporter.

There was no appearance on said day for the Aetna Mill & Elevator Company, owner of said flour, and the claimant herein.

And it appearing from the files, records and proceeding herein that a libel for the seizure and condemnation of a car load of flour consisting of 16 bales of 24-pound sacks, 16 bales of 12-pound sacks, 420 98-pound sacks and 20 barrels of flour shipped from Wellington, Kans., to, and into the State of Louisiana, was filed July 31, 1909; that a warrant of seizure was duly issued and said flour was pursuant thereto duly seized by the marshal while the same was within the jurisdiction of this court and being transported from Wellington in Kansas to New Orleans in Louisiana, for sale, and while it remained unloaded, unmoved and in original unbroken packages; that the Aetna Mill and Elevator Company of Wellington, Kans., duly appeared in said cause on August 11, 1909, and thereafter, on October 1, 1909, duly filed its answer to the libel herein, which answer, on the application of claimant, was pursuant to order of court duly withdrawn and claimant thereafter filed exceptions to said libel—which exceptions were after argument and due consideration overruled, and thereafter the court fixed a time within which the said claimant might make and interpose its answer to said libel; that said claimant refused and omitted to make or interpose any answer to the libel herein within the time so fixed and allowed by the court, or at all, and claimant having, by its proctors, in open court, declared that no answer would be made by it to the libel herein and all delays allowed by law having elapsed, and no other person having appeared to claim the property seized herein, or any part thereof, this court duly ordered, adjudged and decreed that said Aetna Mill and Elevator Company and all other persons interested in the flour so seized, be, and it—the said Aetna Mill and Elevator Company was—and they were duly pronounced to be in contumacy and default, and the said libel was duly adjudged to be taken *pro confesso* against the said Aetna Mill and Elevator Company and all persons interested in said flour seized herein, and that the court proceed to hear the cause *ex parte*. And it was duly ordered that the cause be referred to Frank H. Mortimer, commissioner, to take testimony herein and report the same to the court; that said commissioner has duly taken the testimony offered in behalf of said libellant, the United States of America, and has duly reported the same to the court.

Now, after due consideration and upon all of the testimony, records, files and proceedings herein,—

The court finds; that there is testimony and evidence tending to prove the allegations of the libel, and accordingly,

That all of the flour described in said libel was and is liable to be proceeded against in this court and seized, condemned, confiscated and destroyed as adulterated and misbranded and deleterious food within the meaning of the Food and Drugs Act, approved June 30, 1906, in this, to wit: that all of said flour was, by the claimant herein, the Aetna Mill and Elevator Company, before shipping the same from Kansas into Louisiana, bleached and whitened by treating all of the same by a process known as the “Alsop Process” whereby and by means and reason thereof

(a) A substance known as “nitrites” has been and is mixed and packed with said flour so as to reduce and lower and injuriously affect its quality and strength;

(b) That said flour was and is mixed, colored and stained in a manner whereby damage and inferiority is concealed;

(c) That said flour contains added poisonous and added deleterious ingredients, to wit: nitrites, which renders the same injurious to health.

And that said flour was and is misbranded within the meaning of said act, in this, to wit:

(a) That it was offered for sale under the distinctive name of another article,—that is to say, the said flour was offered for sale as “High Patent Flour,” whereas, in truth and in fact, it was inferior to “Patent Flour” and was a mixed flour consisting of “Straight Flour” mixed with “Clear Flour.”

(b) That it was labeled and branded so as to deceive and mislead the purchaser, that is to say, each of said sacks and other packages containing said flour was labeled and branded in substance as follows: “Aetna Mills—Aetna Silk—High Patent—Aetna Mills and Elevator Company, Wellington, Kansas,” whereas in truth and in fact none of said flour was “Patent Flour,” but, on the contrary, all thereof was and is a mixture of straight flour made in July, 1909, out of a mixture of hard and soft new winter wheat, to which “Straight Flour” there was added and mixed a quantity of “Clear” old wheat flour, amounting to 15 or 20 per cent of said mixture.

It is therefore, ordered, adjudged and decreed that said flour (except that which has been released by order of court), be, and all of same is hereby, condemned and confiscated to the United States of America, as being a food adulterated, misbranded and of a poisonous and deleterious character, and that all of the same be destroyed by the marshal, and that the said libelant, the United States of America, have and recover of and from the Aetna Mill and Elevator Company, the owner and claimant herein, the costs and charges allowed by law.

RUFUS E. FOSTER, *Judge*.

NEW ORLEANS, LA., *March 15, 1910.*

UNITED STATES v. ONE BARREL DESICCATED EGG PRODUCT.

(District Court, E. D. Pennsylvania, April 1, 1910.)

N. J. No. 544.

Desiccated egg product *held* adulterated in that it consisted in whole or in part of a filthy, decomposed and putrid animal substance.

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict for libelant. Decree of condemnation and forfeiture.

J. B. McPHERSON, *District Judge* (charge to the jury). [1] I dare say you all have some general idea, at all events, about the pure food act, although you may not have come into contact with it quite as closely as you have the last day. This proceeding is somewhat unusual. It is not [2] a suit against any particular person, although, in substance, in one of its aspects, it amounts to that; but it is directly a proceeding against a particular article of goods for the purpose of forfeiting it—for the purpose of condemning it. The United

States declares that it is a kind of article which is forbidden to be transported in commerce between the States by the pure food act, and therefore, it may be forfeited, condemned and destroyed; and the pure food act, in one of its sections, confers such power upon the courts of the United States; but, of course, before a remedy like that can be enforced—a very drastic remedy—you see it is taking a man's property from him, and destroying it, even although he has a trial to justify his right to it—his right to retain it—I say, a remedy like that, of course, calls for clear and satisfactory proof on the part of the United States. This is not a criminal trial, strictly speaking, because there is nobody charged with crime, but it is a suit to enforce a penalty, and a severe penalty, as I just said, and, therefore, while the burden of proof is upon the United States, it is not the ordinary burden of proof such as exists in a civil suit between two individuals. In that case, as you no doubt know from your previous service upon juries, all that is necessary is that there shall be a fair balance of evidence in favor of one party or the other. It is not required that there should be, for example, as in a criminal case, proof beyond reasonable doubt, and that degree of proof is not required in this case, either—proof beyond a reasonable doubt; but a higher degree of proof than a mere preponderance, a mere balance of evidence in favor of the Government, is required. It is necessary, in a case like this, that the Government should establish, by clear and satisfactory evidence, that its case has been made out. These terms are necessarily somewhat indefinite, but I can not do any better with them.

Now, has the Government laid before you evidence of that kind and quality? That is the question for your determination. The only part of the act to which your attention need be directed is contained in this language: "If the article complained of"—in this case it is a barrel of egg product—dried egg—"consists in whole or in part of a filthy, decomposed or putrid animal or vegetable substance, then it may be condemned." Now, of course, this is an animal substance. It is made from eggs. It is composed wholly of that substance, as I understand. There is no evidence that there is any admixture; so that we may assume that it is wholly composed of animal substance. Now, is it, therefore, filthy, decomposed or putrid. Either one of these adjectives, if applied to this substance, and established by proof, would be sufficient to justify the jury in condemning it. Now, of course, there is a certain difficulty in dealing with language always; namely, the difficulty of getting at the exact meaning which it is intended to convey; and some words—indeed, a great many words, are incapable of precise definition. Words, as you know, very often mean what we choose to have them mean. They bear the meaning that we put into them, and that meaning varies from time to time, and varies under different circumstances, and that is true about a great many words. Without troubling you longer with general remarks, it is certainly true with regard to these particular words, filthy, decomposed or putrid. Now, if any one attempts to make a scientific definition of these words, so as to give a precise and accurate meaning to each of them, I think he will find that he has undertaken a very difficult task. "Filthy," for example, might be said to be in the superlative degree of a word like soil. You speak

of an article soiled. It conveys to our minds a sufficiently accurate meaning. Then if you say it is dirty, you go a step further, of course. It is pretty hard to say just what the limits are which shall describe an article as dirty, within which it may be properly described as dirty. Then when you say it is filthy, you are at once conscious that you have gone a step further; but just how far, I think it will be very difficult to say—I mean to know accurately and precisely, so that there should be no doubt at all about the limits you have.

[3] And take the two words, that I will speak of together, decomposed and putrid; I think it is fair to say that they represent steps in the same direction. If we take the word rotten as expressing the general idea to which these two words may be referred, decomposed would probably represent a less advanced stage than putrid. I think there could not be any doubt about the word putrid, and yet there certainly would be some doubt as to where you would properly apply the word decomposed. It was said by one of the witnesses yesterday, and I thought very accurately said, that through our common experience there are certain kinds of cheeses, for example, which are eaten, and eaten extensively; but to which, certainly, the word decomposed, in some of its meanings, may properly be applied; and no doubt it is true with regard to certain other products, which I need not speak of, animal and vegetable. The process of fermentation is a process of decomposition. If fermentation goes on long enough, the article falls to pieces. Sugar, when it is fermented, begins to break up; and decomposition means, of course, to break up; to decompose, to resolve into its elements. So that when fermentation has proceeded far enough, it becomes decomposed, and to say just precisely where fermentation ceases and decomposition begins would be a very difficult task. I have been speaking to you in a very general way about the effort to assign a precise meaning to such words as these, but it is not necessary for you to trouble yourself, I think, about that matter. It is a general rule, with regard to all statutes passed by the legislature, or by Congress, that the meaning which the words bear is the usual and ordinary and everyday meaning which language is given in its common use among men. Laws are addressed to the community, and, therefore, they properly are construed in accordance with the sense which their language bears among the people that compose the community. Therefore I say, as I have just said, I think you will have very little trouble in assigning a sufficiently accurate meaning to these words. Filthy and decomposed and putrid, I think you will agree, convey a sufficiently definite meaning to the ordinary mind, and particularly—and this is what concerns us now—in relation to the subject matter about which they are applied, namely, food. It is an act with regard to food. It is an act with regard to pure food, and that is the effort of the statute, to see that the people get pure food; and, therefore, when a substance which professes to be food is to be condemned because it is filthy, decomposed or putrid, necessarily those words are to be applied to the subject matter of the act, the substances that are offered for food; and, therefore, as I say, when you come to deal with that subject, as you are dealing with it, and attempt to apply these words to it, it requires the jury to say what is the condition of this substance, considered as food, offered for that purpose. Would it

properly, in the ordinary use of these words, be condemned as filthy, or would it properly be condemned as decomposed or putrid? Now, I have no doubt—or, at least, I trust—you get my meaning with regard to that. You are not required to assign scientific definitions to these words at all. You are simply required to give them their ordinary and usual meaning, and then apply that to the evidence in this case, and determine whether, in either respect, this substance can be said to offend against the statute. The Government's case, as I understand it, depends solely upon the presence of these minute vegetable existences in the product. I am right about that, am I not?

Mr. DOUGLAS. No, animal existences.

The COURT. They are not always animal. Some of them are and some of them are not. Most of them are vegetable.

Mr. SHERN. Organisms.

The COURT. They are organisms, but the vast majority of them are vegetable. There are a few that are animal, but only a few. But, at all events, it is the presence of these organisms on which the Government relies.

Mr. DOUGLAS. Yes, sir.

[4] The COURT. Now, you have heard a good deal of testimony with regard to the presence of these bacteria or bacilli, I do not know exactly which word is the precise and proper word to apply, but, at all events, these very minute microscopic creatures, which, within a comparatively few years, have become of great importance. Now, you have a great deal of testimony about it from these gentlemen who have made the subject a study, and I commend their testimony to you for your careful consideration. We are, necessarily, in a subject like this, obliged to rely upon the testimony of expert witnesses, and their testimony is to be given a great deal of attention, and it is for the jury to say what its value is, and how far it may safely be relied upon. It may, perhaps, be difficult for the jury to come to a conclusion upon that matter, and yet there is not any other tribunal to whom that subject can be left, and especially is that the case where, as here, there is a difference of opinion among the experts with regard to the conclusion that ought to be drawn. That is not at all an uncommon situation, and it is not at all a situation—or, at least, it is not a situation that need be dwelt upon with any degree of reprobation. It is comparatively common, I may say, to speak of expert testimony with a subdued sneer, at all events, and sometimes with an open sneer. I do not think it is justified in a great majority of the cases. These gentlemen are—there is no possible reason to doubt—I am not speaking especially about the witnesses in this case, but expert witnesses generally—they are almost always entirely honest, and desirous, to the last degree, to give the best evidence they can upon the subjects concerning which they are asked questions, but they are human, like other people. They have their own theories. They sometimes have their own biases and prejudices, which color their views, and in that subject, like the one that is before us, you can see there is a great deal of room for difference of opinion. The subject matter is one that is difficult to have accurate information on, although you may have approximate information that is substantially sufficient; and then besides, in an examination of these substances, if a sample were taken

from one part of this large package, it might be of one quality, and then beside that there may be a sample that would be of a very different quality. So that one witness examining one sample and one examining another—they might come to what seemed to be widely different conclusions, and are, if you regard the two samples as of the same quality; yet, if they are of different quality, of course the differences in their testimony is accounted for. I do not think it would be either necessary or desirable for me to comment upon their testimony. Counsel have already done that sufficiently, and besides their testimony was not difficult to understand, and I have no doubt you all understand it sufficiently for all purposes.

From their testimony, I repeat, the question for you is whether this substance was, at the time it was seized, either filthy, decomposed or putrid, with special reference to the fact that it was offered and intended as food, not whether it was going to be in the future, or whether it might be in the future, owing to the presence of these creatures—these organisms in it, but whether it was at that time of that description; because it is to that time that the Government necessarily is confined.

Now, that is the case, and I do not believe I can assist you any further in the matter. I have endeavored to give you what I think is the proper method of the construction of this statute, and, as you will see, the question is a very narrow one, it is one for you to determine very largely, or in large part, by the aid of your common sense and common knowledge with regard to the meaning of these words. I cannot say to you definitely what they mean. It is for you to say what they mean, the kind of words I have given you. Of course, you have not any arbitrary right on that subject, but what their meaning is is what they mean to the ordinary citizen to whom they are addressed. They have not, as I conceive in this statute, a precise and scientific definition. Their meaning must be determined by a consideration of the subject matter about which they are dealing, namely, pure food—as pure food as possible, [5] and in that light, the jury, with the instructions I have given them, must determine the question. Your verdict in the case would simply be in favor of the United States, if you find that this substance should be condemned, or in favor of the claimant, if you find that the Government has not made out its case, tested by the rule with regard to the burden of proof to which I have referred.

UNITED STATES v. BUFFALO COLD STORAGE COMPANY.

(District Court, W. D. New York, April 30, 1910.)

179 Fed. 865; N. J. No. 482.

Held that the Food and Drugs Act, providing that any person who shall ship or deliver for shipment any adulterated or misbranded foods or drugs shall be guilty of a misdemeanor, is not limited to a manufacturer or dealer, but applies as well to a warehouseman shipping adulterated or misbranded goods from one State to another.

On demurrer to indictment for violating section 2 of the Food and Drugs Act. Demurrer overruled. Jury trial. Verdict of guilty.

[866]¹ HAZEL, *District Judge* (overruling the demurrer). The demurrer of the defendant, Buffalo Cold Storage Company, to the indictment is predicated upon the claim that the statute (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. Supp. 1909, p. 1187]) entitled: "An act for preventing the manufacture, sale, or transportation of adulterated, misbranded or poisonous or deleterious foods, drugs, medicines and liquors, and for regulating traffic therein, and for other purposes," was intended solely to apply to a manufacturer or dealer, and, as it is not charged in the indictment that said defendant was either a manufacturer, owner, or dealer in the commodity, the indictment is fatally defective and must be dismissed. With this contention I do not agree. The statute forbidding the act provides that: "Any person who shall ship or deliver for shipment from any State or Territory, etc., to any other State or Territory any such article so adulterated or misbranded shall be guilty of a misdemeanor." Concededly the shipment and delivery of the commodity for transportation from Buffalo to Pittsburg in adulterated or impure condition is within the letter of the statute. It is unquestionably true that the inhibition of an act may be so plainly expressed by a statute that he who runs and thinks may comprehend its complete import and still not be within the contemplation of the law makers, but the provision under consideration does not fall within this class. Congress by its enactment intended to promote honesty and fair dealing in trade and secure to the public pure and wholesome food and drugs, and manifestly there must be a reasonable construction of the act to carry out the intention of Congress in this regard. There is nothing in the act which will result in any absurdity or lead to injustice or oppression, as was the case in *Church of the Holy Trinity vs. United States* (143 U. S., 457, 12 Sup. Ct. 511, 36 L. Ed. 226), and other cases of similar description cited in defendant's brief.

I have carefully read the excerpts of the debates in Congress on the subject prior to the passage of the act, and I think from what was said by Senators Heyburn and Money that the prohibition was expressly couched in broad language to include those who ship or deliver for transportation commodities of the character forbidden by the statute. It is quite true that warehousemen who deliver such commodities for transportation may not have knowledge of the deleterious character of the food and may be wholly innocent of [867] criminal intent; but this is a question which may be safely left to the trial jury. The indictment charges the offense in the language of the statute and particularizes the nature of the offense in such a way as to apprise the defendant as to what he will be required to meet on the trial, and under the authorities this is sufficient. *Ledbetter v. United States*, 170 U. S., 606, 18 Sup. Ct. 774, 4 L. Ed. 1162; *Armour Packing Co. v. United States*, 209 U. S., 56, 28 Sup. Ct. 428, 52 L. Ed. 681; *Burton v. United States*, 202 U. S., 344, 26 Sup. Ct. 688, 50 L. Ed. 1057.

The demurrer is overruled.

¹ Numbers in brackets refer to pages of Federal Reporter.

BRINA v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit, May 2, 1910.)

179 Fed. 373; N. J. No. 473.

An article labeled "Olio per Insalata, Sopraffino Vival Brand, Cotton Salad Oil extra quality," held misbranded in that such label was calculated to mislead the purchaser into the belief that the article was olive oil.

In Error to the Circuit Court of the United States for the Southern District of New York.

Guido Brina was convicted of a violation of section 2 of the Food and Drugs Act, and brought error. Affirmed.¹

STATEMENT OF FACTS.

This cause comes here on writ of error from a judgment of the Circuit Court, Southern District of New York, imposing a fine of \$100, entered on a verdict of a jury finding defendant guilty of a violation of the Food and Drugs Act of June 30, 1906. The offense charged was the shipment from New York City to Newark, New Jersey, of cotton seed oil contained in cans labeled (the Italian words in large type and the English words in small type) as follows: "Olio per Insalata, Sopraffino Vival Brand, Cotton Salad Oil extra quality."

It was charged that the oil was misbranded in that the label failed to disclose to Italian purchasers ignorant of the English language that the oil was a cotton seed oil, and that it was calculated to mislead the purchaser and induce him to believe the cans contained Italian olive oil.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, *Circuit Judge* (after stating facts as above). The section declared on (section 2) imposes a penalty on "any person who shall ship or deliver for shipment from any State * * * to any other State * * * any article of food or drugs so * * * misbranded." It was proved that the words "Olio per Insalata" mean "oil for salad" or "salad oil" and the trial judge held, and so charged the jury, that "as a notorious fact salad oil *prima facie* means olive oil," but allowed the defendant to show if he could that "it means something else because of recent events which have perhaps rendered olive oil more difficult to obtain, or that other food elements have come to be known as salad oil." No such proof was introduced [374]² and the ruling is assigned as error. The Century Dictionary, Worcester's, Stormonth's, Imperial, and the Encyclopedia all define "salad oil" as "olive oil;" Webster's does not give any definition. We are satisfied that the trial judge quite properly charged, in the absence of any testimony of the sort suggested, that "salad oil *prima facie* imports olive oil; that is what the world has been accustomed to regard as salad oil."

The evidence showed that the articles complained of were sold and shipped by the "Standard Trading Co." of which defendant was an

¹ For case of United States v. Brina, see N. J. No. 80.

² Numbers in brackets refer to pages of Federal Reporter.

employee—its “manager.” He negotiated the sale. It did not appear whether the concern was a corporation, or a firm, or an individual trading under this corporate name; nor whether the defendant had any interest in the concern other than as employee. It is contended that the circuit court should have directed a verdict of not guilty at the close of the case on the ground that there was not sufficient proof to sustain a finding that he personally shipped the goods or caused them to be shipped. The plaintiff in error is in no position to make such contention in this court. At the close of the Government’s case motion was made to dismiss the information upon several grounds; one of which was “that it has not been shown that the defendant Brina shipped these goods to any place out of the State.” The motion was denied and exception reserved. Testimony was thereafter introduced by the defendant on the various issues in the case, part of it being directed to the matter of shipment. At the close of the case defendant renewed his motion to dismiss the information, but only “on the ground that it has not been shown by any evidence that the can which was used in this case deceived any of the public.” This motion was denied, the court stating that it was “the only question for the jury.” No objection was taken on the ground that shipment was not proved, nor was there any request to go to the jury on that question. There is, therefore, no exception in the case which raises the point now relied upon.

The judgment is affirmed.

SHAWNEE MILLING CO. v TEMPLE, U. S. DIST. ATTY., ET AL.,
AND UPDIKE MILLING CO. v. SAME.

(Circuit Court, S. D. Iowa, C. D., May 10, 1910.)

179 Fed. 517; N. J. No. 497.

Injunction to restrain officials of the United States from seizing bleached flour under section 10 of the Food and Drugs Act, for alleged adulteration, not granted.

In Equity. Bills by the Shawnee Milling Company and the Updike Milling Company against Marcellus L. Temple, United States district attorney, and Frank B. Clark, United States marshal, and others, to restrain them from seizing complainants’ flour in interstate shipments under the Food and Drugs Act. Bills dismissed.

[518]¹ SMITH McPHERSON, *District Judge*. Each of these two cases is by a bill in equity, practically the same. One of complainants, Updike Milling Company, is a corporation under the laws of Nebraska, there engaged in the business of manufacturing wheat into flour both for domestic use and for shipments into Iowa and other States for sale and consumption. The other complainant, Shawnee Milling Company, is a corporation under the laws of Kansas, there engaged in a like business, sales, and shipments.

The defendants are the United States attorney and marshal for this district, and the relief sought is to enjoin the respondent officers from having issued, or serving process for seizing complainants’

¹ Numbers in brackets refer to pages of Federal Reporter.

flour in interstate shipments under the national pure food statute of June 30, 1906 (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1909, p. 1187]).

The allegations are that complainants' flour is whitened and aged by a process, and that the same is not harmful, but is more nutritious, wholesome and attractive for making bread. It is not alleged in the bill of complaint in terms that the flour is bleached by the Alsup [519] process as covered by certain English and American patents, as set forth by the Circuit Court of Appeals for this circuit in the case of *Naylor v. Alsup Process Company*, 168 Fed. 911, 94 C. C. A. 315; but all the arguments, both by briefs and orally, were on that state of facts. Counsel for the United States have appeared for the defendants, thereby in effect making the cases controversies between the United States Government, on the one side, and western flour mill owners, on the other, who bleach their flour by the agency of nitrogen peroxide gas under the Alsup patent process.

A literal reading of the bills of complaint will show that they are fairly subject to criticism; that the allegations as to the aging, whitening, and improving the flour are largely by the use of adjectives and adverbs, instead of reciting just what is done, how the flour is aged, how whitened, how made more nutritious, why not harmful, and why better by the use of some agency not named nor described. But this criticism need not be elaborated. The cases are now for determination on demurrers to the bills of complaint, and sufficient allegations appear to cover the rulings now to be made.

A bill in equity in which the writ of injunction can issue to enjoin the enforcement of a criminal or penal statute is allowable only when:

- (1) Such statute is unconstitutional or otherwise invalid;
- (2) In the attempt to enforce such invalid statute, rights of property are invaded and trampled on; or,
- (3) The often repeated attempts to enforce such invalid statute creates a multiplicity of actions which are of themselves oppressive.

The important and recent case of *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, illustrates this, in which case it was held that a bill in equity would confer jurisdiction because of the oppressive penalties if an effort should be made to protect the rights of property. In *City of Hutchinson v. Beckham*, 118 Fed. Rep. 399, 55 C. C. A. 333, the Circuit Court of Appeals for this circuit held that an injunction should issue against the prosecution of cases under an invalid ordinance requiring an illegal license, which would be followed by many criminal prosecutions. In *Dobbins v. Los Angeles*, 195 U. S. 223, 241, 25 Sup. Ct. 18, 22 (49 L. Ed. 16), the holding was clearly and tersely stated:

It is well settled that, where property rights will be destroyed, lawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity.

But if property rights are not invaded, then a court of equity ordinarily will not interfere, because the defense as to the invalidity of the statute can be urged in the criminal or penal action or special proceeding. Thus, in the case of *In re Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402, it was held that proceedings for the ouster of a city officer could not be enjoined for the alleged invalidity of the

law under which the proceedings were being conducted. And of like holdings are the cases of *Harkrader v. Wadley*, 172 U. S. 148, 19 Sup. Ct. 119, 43 L. Ed. 399, and *Fitts v. McGhee*, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535.

And if the proceedings for seizure are to be regarded as civil, then section 723, R. S. (U. S. Comp. St. 1901, p. 583), [520] will prohibit the filing of a bill in equity to enjoin the enforcement of a valid statute.

In the one case now before the court, the bill of complaint recites that several seizures of flour were made in this judicial district, and, after a number of efforts by the complainant to have the cases submitted to the court with or without a jury for a hearing on the merits, the Government dismissed the cases, after the flour thus seized had deteriorated in quality and value.

In the cases now before the court, as property rights are involved, bills in equity will be entertained, provided the statute under which the Government claims the rights to proceed is not a valid one. Herein is the question in the case. That is to say, Is the pure food statute of June 30, 1906, a valid enactment? Did Congress have the power to enact it? Is it within the commerce clause of the Constitution, or is it a mere police regulation, garbed and cloaked as a regulation of commerce?

Good, sound wheat of the best variety, properly and timely harvested, put through the "sweat" in the stack, well ground and bolted, makes nutritious, wholesome, and white flour. This fact is so generally known that courts will take judicial notice of the fact.

It is said that flour made from new and poorer wheat, not "sweated," and made by the process covered by the English patent of Andrews, or the American patent of Alsop as illustrated in the patent decision hereinbefore referred to (168 Fed. 911, 94 C. C. A. 315), will also be equally white. This is quite likely true. But is it equally pure, equally nutritious, or is it adulterated and poisoned?

This court in these cases is not to decide those questions. Nitrogen peroxide gas under the Andrews patent is produced by combining nitric acid with a metallic compound. Under the Alsop patent it is produced by subjecting atmospheric air to a flaming electric arc. It is claimed by some that nitrogen peroxide is the agent for bleaching flour under both patents, while others claim that it is the ozone that does the effective work, while the nitrogen peroxide is a by-product when the ozone is thereby created.

Whatever the truth is as to what does the bleaching, it is both claimed, and denied, by chemists who ought to be able to agree, that the flour is poisoned by such process. But it is known that, after the air is thus subjected to continuous flaming electrical discharges, that the resultant gas is conveyed by means of pipes to a compartment, and there is commingled with the flour agitated or in a cloud, and thus subjected to said treatment it becomes dry and white. The result of it all is that new wheat and of an inferior quality is converted into flour with the appearance of flour from a better wheat that has been aged by time.

The Government contends that flour thus bleached is flour in the language of the statute "whereby inferiority is concealed," and that "it contains added poisonous ingredients which may render such

article (flour) injurious to health." The patentees and the millers deny this.

Here is a question for determination by a jury, or by the court if a jury is waived, and not to be determined in this case if the statute is valid.

[521] Several of the States within the past few years have enacted pure food statutes. Congress, June 30, 1906, enacted the statute in question. All these statutes were enacted to cure evils well nigh intolerable that had grown up during this age of greed and avarice and commercialism that has made money getting the prime object of life with so many. The evils were such that much of the foods we ate, whether meats of any kind, including fish and poultry, or fruits in all forms, and breadstuffs, were so adulterated and "loaded" or "doctored" as to deceive the consumer. And the same was true of flavors and condiments. The evil as to confectionery and extracts was as great. Still greater was the evil as to drugs and medicines. In fact, the evils were everywhere present, as to food and medicine, and other things. And to eliminate some of these evils, and to enable the purchasers to receive what they ordered and paid for, many States passed statutes aimed at those frauds. But it was soon found that the States in some instances were disposed to condone as to some articles of local manufacture, and in many other instances the States were powerless to work out a remedy. Thereupon Congress, acting upon the theory that the evil was of national concern, enacted the statute in question. The debates in Congress show that the measure was earnestly fought as being one of paternalism, and a police regulation with which the States only could act.

The Secretary of Agriculture, Mr. Wilson, performed his duty both in letter and spirit when he submitted the question as to flour bleached by nitrogen peroxide to the Board of Food and Drug Inspection; and that board, the Secretary concurring, after a hearing given to all parties in interest, found that such flour is in contravention of the statute. Such finding is not binding as against the parties thus bleaching flour. But it is conclusive as against all criticism for making the seizures and bringing the question before the courts for determination.

Congress is given the power to provide for the general welfare of the United States. But without doubt, if this legislation is sustained, it is because of that provision of the Constitution that provides that the Congress shall have the power to regulate commerce among the several States. That provision is the life of the nation, and to adopt which was the great concern of the convention of 1787. Important as it is, it is ever before the courts. It gives great comfort to all who believe in one common country, and yet is antagonized oftener than any other provision of the Constitution, by those whose shield of defense is articles 9 and 10 of the amendments, as to the reserved power of the States.

No one claims that Congress can be the sole judge of its powers. All thoughtful persons concede that any court having jurisdiction in the first instance must pass upon the question of the powers of Congress, and that it is for the Supreme Court in the end to finally set the matters at rest. But so careful have our Congresses and Presidents been, that for the first hundred years of our Government, the

Supreme Court found it necessary to hold that Congress had exceeded its powers in only twenty instances. See Appendix to 131 U. S. ccxxxv. And of those twenty statutes thus held void not one related to commerce. Since then, the Supreme Court has held three congressional [522] enactments void. One was a statute making a judgment of conviction conclusive evidence against a party in another case. *Kirby v. United States*, 174 U. S. 47, 19 Sup. Ct. 574, 43 L. Ed. 809. Another was the income tax case. *Pollock v. Farmers' Loan Co.*, 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759, and 158 U. S. 601, 15 Sup. Ct. 912, 39 L. Ed. 1108. The other, and only one from the organization of our Government to date as to commerce, is that of the employer's liability statute, enacted under the claim that the commerce clause would sustain it. *Employer's Liability Cases*, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297. If other enactments of Congress have been held void by the Supreme Court, such cases have been overlooked, and it is believed there are none other. There are almost innumerable decisions touching the power of the States with reference to commerce. It would be to no purpose to discuss many of these authorities. And it would be a needless waste of energy to discuss the many decisions relating to the use of the mails, for the obvious reason that a distinct clause of the Constitution empowers Congress to control our postal system, and there is not the slightest difference whether the mails thus carried are State or interstate.

Neither the court nor the parties are aided by a review of these matters. It must be and is conceded that police regulations alone are for the State, and not for Congress, to deal with.

But it does not follow that, if the subject-matter to be regulated is one of commerce, it is for the State alone to deal with, because such subject matter is also one that pertains to the morals, health, or good order of the community.

Thus, when the question arose as to the inspection of meats for food, legislatures claiming that they alone could determine when and to what extent police regulations should be carried, the Supreme Court decided that such inspections also impinged upon the rights of commerce and were therefore void. *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455; *Brimmer v. Rebman*, 138 U. S. 78, 11 Sup. Ct. 213, 34 L. Ed. 862.

It will serve no purpose to discuss the principle upheld in *Wilson v. Blackbird Creek Company*, 2 Pet. 245, 7 L. Ed. 412, that the State can regulate certain interstate commerce of a local character, if Congress has not acted, nor of that other principle upheld by Congress that the State can legislate with reference to liability of a party when doing an interstate business when Congress has not acted. *Sherlock v. Alling*, 93 U. S. 99, 23 L. Ed. 819. The complete answer to those suggestions is that in the matter now before the court Congress has acted. The question now for consideration is not as to the power of the States relating to commerce, as held in *Smith v. Alabama*, 124 U. S. 465, 18 Sup. Ct. 564, 31 L. Ed. 508, upholding a State statute requiring a locomotive engineer even though operating an interstate train to submit to tests for color blindness.

The question here is as to the power of Congress over articles of interstate commerce, even though such articles in the end become subject to State statutes. No one doubts but that wheat and flour, as

well as all articles of food, are subjects of commerce, and, when carried over and across State lines, are subject to be regulated by Congress. [523] And it is no answer to say that when adulterated, or wrongly labeled, because in the end they will fall under a State statute, they when being shipped can not be covered by a congressional enactment. The liquor cases illustrate this, because of all the subjects of commerce there is no one thing more peculiarly and distinctly and appropriately subject to regulation by the State, even to the extent of prohibition, than are intoxicating liquors. And yet Congress legislates with reference to liquors. The Wilson act of 1890 (Aug. 8, 1890, c. 728, 26 Stat. 313 [U. S. Comp. St. 1901, p. 3177]) provided that when liquors arrived in a State they should be subject to State laws. This statute was upheld in the case *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572, thereby modifying the practical effect of the holding in *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128, that the State could not interfere by legislation as to liquors shipped interstate as long as the liquors were in the original packages; while in *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088, it was held that the liquors must be in fact and actually delivered to the purchaser before the State laws became effective as to such interstate shipment. No one should doubt but that legislation by Congress can control the interstate subject of commerce for a time at least, and then the State by a police regulation can control.

If liquors do not sufficiently illustrate the question, lottery tickets will. The Louisiana lottery was conducted by men of high repute and much renown. But it became a national scandal. It was struck at by denying it the use of the mails. The legislature of the State gave it encouragement, even its life. But Congress provided in addition that it should be a crime to carry lottery tickets from one State to another by means other than through the mails. Can any person doubt but that the Louisiana lottery was or could have been made subject to the laws of Louisiana? And yet this congressional enactment was upheld in the Lottery case, 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492. But little need be said of that case. It was argued by counsel of great eminence. It was argued upon two separate occasions. It received the fullest consideration by the Supreme Court. Apparently no other case that was ever before that court received more attention and fuller consideration. Counsel for complaints herein concede all these things. And the only answer that has been made, or that can be made to that case, is in the statement that the case was decided by a divided court, four justices dissenting. It may be, or it may not be, that that weakens the case as an authority. It is barely possible that later on, that court changing as to its personnel, the decision may be overruled. But such reasoning is a mere speculation. On the other hand, the fact that the court was so divided emphasizes the fact that the court gave great consideration to the question. But be these things as they may, it is not for this court to usurp the prerogative by blindly declining to follow that decision. That decision stands, and as long as it stands, it is the law of the country, and this court not only must, but does, cheerfully observe it in all its phases.

Much more could be said. Cases commencing with *Gibbons v. Ogden*, and then to date, could be reviewed. The question could be

[524] illustrated in many ways. But all that would be to no purpose; it would be academic.

Congress has enacted a safety appliance law for the preservation of life and limb.

Congress has enacted the anti-trust statute to prevent immorality in contracts and business affairs.

Congress has enacted the live stock sanitation act to prevent cruelty to animals.

Congress has enacted the cattle contagious disease act to more effectively suppress and prevent the spread of contagious and infectious diseases of live stock.

Congress has enacted a statute to enable the Secretary of Agriculture to establish and maintain quarantine districts.

Congress has enacted the meat inspection act.

Congress has enacted a second employer's liability act.

Congress has enacted the obscene literature act.

Congress has enacted the lottery statute above referred to.

Congress has enacted (but a year ago) statutes prohibiting the sending of liquors by interstate shipment with the privilege of the vendor to have the liquors delivered c. o. d., and to prohibit shipments of liquors except when the name and address of the consignee and the quantity and kind of liquor is plainly labeled on the package.

These statutes, police regulations in many respects, are alike in principle to the act of June 30, 1906, under consideration. Can it be possible they are all void?

This statute by its title, and by its every provision, plainly shows that it is with reference to commerce, and that it is not with reference to local police regulations.

It is also contended that so much of section 7 of the statute as relates to food is void because no standard has been fixed.

That argument is made because drugs are fixed by a standard recognized by the United States Pharmacopœia or National Formulary, and as to confectionery a standard is fixed by declaring what confectionery "shall not" contain. Whereas, as to foods no standard has been fixed. It is a fact most obvious that no standard could be fixed other than was done by Congress. The one provision as to food is that it shall not be mixed so as to reduce or lower or injuriously affect its quality or strength. Another provision is that some substance shall not be substituted wholly or in part for the article. Another provision is that no valuable constituent of the article shall be abstracted. Another provision is that it shall not be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed. Another provision is that poisonous or other deleterious ingredients shall not be added. Still another provision is that filthy, decomposed, or putrid substances shall not be added. And so on more in detail than herein enumerated. These provisions present questions of fact as to every alleged contraband article. This objection is without merit.

This case was argued upon both sides with most signal ability, displaying much learning, and was argued at great length. The case has received from this court the fullest consideration, and the conclusions are that these bills in equity can not be maintained, and therefore will be dismissed.

UNITED STATES v. 1,950 BOXES OF MACARONI ET AL.

(District Court, N. D. Illinois, E. D., May 16, 1910.)

181 Fed. 427; N. J. No. 658.

Macaroni, to which a coal tar dye known as "Martius Yellow" had been added, *held* adulterated in that it contained an "added poisonous * * * ingredient which may render it injurious to health."

Libel under section 10 of the Food and Drugs Act, against 1,950 Boxes of Macaroni, and four other cases; V. Viviano & Bros. and S. Viviano & Bros., claimants. The cases were consolidated and tried as one case. Decree of condemnation and forfeiture and product ordered destroyed.

LANDIS, *District Judge*. These libels seek the destruction of five interstate shipments of macaroni charged to have been adulterated by the addition of a coal tar dye known as "Martius Yellow," alleged to be a poison rendering the food product injurious to health. Food and Drugs Act (Act June 30, 1906, c. 3915, section 7, paragraph 5, 34 Stat. 769 [U. S. Comp. St. Supp. 1909, p. 1191]). The question is whether the article proceeded against "contains any added poisonous * * * ingredient which may render it injurious to health."

The proof shows macaroni to be composed of wheat flour and water; that to change its natural color, and make its appearance more inviting, Martius Yellow was added; that this coloring matter is not an ingredient of macaroni, serves no purpose other than to change its color, and is a poison which will kill.

It is the duty of the court to give the act a fair and reasonable construction for the accomplishment of its object. That object is the exclusion from interstate commerce of food products so adulterated as to endanger health. And where, as here, it clearly appears that a poisonous substance wholly foreign to the food product has been added to it solely to mislead and deceive, the court is under no duty to endeavor to protect the offender against loss from destruction of the adulterated article by indulging in hair-splitting speculation as to whether the amount of poison used may possibly have been so nicely calculated as not to kill or be of immediate serious injury. With a [428]¹ portion of our population macaroni is a staple article of food, and under the evidence here the cumulative effect of the poison in the substance under examination would be injurious to health. Let there be a decree of condemnation and destruction.

UNITED STATES v. BAUMERT ET AL.

(District Court, N. D. New York, May 23, 1910.)

179 Fed. 735.

Process on an information charging violation of the Food and Drugs Act refused by the court on the ground that the information was not properly supported by affidavits showing probable cause.

Information charging violation of the Food and Drugs Act. On motion for process. Denied.

¹ Numbers in brackets refer to pages of Federal Reporter.

[736] RAY, *District Judge*. The information, as to all material allegations, is made on information and belief, and charges the shipping, etc., in interstate commerce between Antwerp, N. Y., and points in the State of Pennsylvania, of misbranded cheese, in violation of the so-called "pure food and drug law." (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1909, p. 1187].)

Annexed to the information which is verified by the oath of Geo. B. Curtiss, United States attorney for the Northern District of New York, to the effect that the allegations are true except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true, are: (1) Letter of Wade H. Ellis, Acting Attorney General of the United States, inclosing "copy of report and other documents transmitted to this department by the Secretary of Agriculture relative to the apparent violation of the Food and Drug Act by F. X. Baumert & Co., New York, in the shipment of misbranded cheese from Antwerp, N. Y., to Detroit, Mich.," and directing that "immediate and proper action" be taken in the matter. Also, what purports to be a letter from F. Baumert & Co., under date of August 3, 1909, to the chief of the Food and Drug Inspection Laboratory, New York City, stating that the firm has been charged with making and selling a misbranded "Neufchatel cheese," but taking issue with and denying the charge as to misbranding, while admitting the firm made and sold the cheese of which the sample referred to was a part. There is no proof that the defendants, or the firm of which they are members, wrote or authorized this letter. Also, a statement signed by J. G. Riley, analyst, United States Department of Agriculture, in which he says he has examined a sample of cheese labeled: "Crown Brand Neufchatel Cheese. Made in the State of New York from partly skimmed milk"—and which he believes to be the sample purchased from McCann & Co. at Pittsburgh, Pa., on or about June 25, 1909, by Inspector C. A. Meserve of the United States Department of [737] Agriculture and designated by him as "I. S. No. 26086-a"; and that he has made a careful analysis of same and found that "it is not Neufchatel cheese." This statement is not in the form of an affidavit, has no venue, but, after the signature of J. G. Riley, contains the following certificate, "Subscribed and sworn to before me at Washington, D. C., this 5th day of November, 1909." Signed: J. G. Shibley, Notary Public. The seal of the notary, bearing the words "J. G. Shibley, Notary Public," is attached. There is nothing to show that Shibley was a notary when he certified the paper, or that he was authorized to take affidavits or administer oaths in Washington, D. C. There is also attached a statement purporting to be that of McCann & Co. showing where that firm purchased the cheese, and what purports to be a letter of F. X. Baumert & Co., dated July 31, 1909, addressed to the chief of the United States Food and Drug Inspection Laboratory, Pittsburgh, Pa., referring to the specimen "I. S. No. 26086-a," and admitting the making of the cheese from which that specimen came and the selling of same to McCann & Co., but asserting that such firm would present proof that the finding of the analyst of the department was an error. There is no proof or even affidavit that the letter was written by the firm or authorized by it. The information expressly states that these letters are the sole basis of the information and belief of the United States attorney.

But assuming that the letters show they were written by the defendants' firm, they do not admit any offense against the law, but deny. At most they admit the making and sale in interstate commerce of the cheese while denying that same offends against the law. They assert it was and is just what the brand says, domestic made Neufchatel cheese; that is "Crown Brand Domestic Neufchatel Cheese. Made in the State of New York from partly skimmed milk."

We have, then, as the only evidence (if it be evidence) of the commission of the offense charged in the information on information and belief, this statement of Analyst Riley verified as stated, who says the cheese "is not a Neufchatel cheese."

This paper is filed with and attached to the information. On this information, supported by these papers and others, now referred to, can this court issue process and cause the arrest of the defendants accused?

A supplemental information on information and belief has annexed the affidavits of James W. Chesewright, made at Pittsburgh, Pa., and that of Charles A. Meserve, made at the same place, the last being taken before a United States commissioner, showing the sale and purchase of the sample of cheese referred to. It raises the plain question whether an information made solely on information and belief and giving as the sources of such information certain letters and affidavits taken out of court and outside the jurisdiction of the court which are attached to and filed with the information, such affidavits tending to support the charge, is sufficient. There is no substantial doubt that offenses against this act may be prosecuted by information duly filed.

[738] It is clear that the court has no jurisdiction to direct the issuance of a warrant on an information filed, made on the information and belief of the United States attorney alone. It must be supported by proof establishing probable cause; that is, by legal evidence that a crime has been committed and that there is probable cause to believe the accused guilty of the commission thereof.

The Constitution of the United States (Amend. 4) has wisely provided that:

No warrant shall issue but upon probable cause supported by oath or affirmation.

However convenient and inexpensive it might be to ignore this provision of the Constitution, a due regard for the rights of the citizen and the danger of gross abuses of the old system which had its basis in the now exploded idea that the king—that is the government—can do no wrong, led to the adoption of this amendment to the Constitution. But it may be and is contended that this provision is complied with when an information setting forth on information and belief the facts claimed to exist is filed accompanied by the mere affidavits of third persons cognizant of the facts, taken out of court by any officer authorized by law to take and certify affidavits; that in such case the information is supported "by oath or affirmation"; and that it is not necessary that the evidence be given in court or before the officer issuing or directing the issuance of the warrant. In short, the contention is that affidavits taken in various States, judicial districts, and jurisdictions before United States commissioners, notary publics, and judges, may be filed with the information made

solely on information and belief, and that the charge made in the information is then supported "by oath or affirmation." If this construction is to prevail, this information is sufficient, provided a mere signed statement with a certificate attached signed by some commissioner, notary, or judge, that it was sworn to on a certain day at a certain place, constitutes a legal affidavit.

Hughes, Federal Procedure, p. 43, says:

A complaint to justify an information must show personal knowledge and probable cause.

On this point the author cites *Johnston v. United States*, 87 Fed. 187, 30 C. C. A. 612; *United States v. Tureaud* (C. C.) 20 Fed. 621. The *Johnston* Case is not in point here, as there the affidavit of Dudley in support of the information, which was signed but not verified by the United States attorney, so far as appears, was taken before the judge of the District Court who issued the warrant. The affidavit stated conclusions merely and not facts. The court said:

The affidavit on which the information was based was wholly insufficient to warrant the arrest and trial of the plaintiff in error, and is altogether too general in terms as to the offense against the United States said to have been committed, and it shows no knowledge, information, or even belief on the part of the affiant as to the guilt of the party charged beyond the bare statement that "there is probable cause to believe that the said offense has been committed by P. T. Johnston." However false the affidavit may be, it would be next to impossible to assign and prove perjury on it.

[739] While the case speaks of affidavits as the foundation of an information, it is silent on the question whether they must be taken before the court or judge issuing the warrant. *United States v. Tureaud* (C. C.) 20 Fed. 621, is in point on the question that an information on information and belief and supported by an affidavit or affidavits made on information and belief is sufficient, but is not in point on the question whether or not the affidavits must be taken before the judge or court granting the warrant, except as we might infer that an affidavit taken before a United States commissioner will be deemed sufficient. In that case the affidavit in support of the information was taken before a United States commissioner and not the judge; but the point was not raised, so far as appears, that it should have been taken by the judge holding the court, or directing the issuance of the warrant. In that case the court said:

The procedure by information, therefore, after it was acted upon by this amendment, lost its prerogative function or quality. It could not thereafter be the vehicle of preferring any arbitrary accusation—not by the king, because we have in the department of criminal law no successor to him, so far as he represented a right to institute, if it pleased him, unsupported incriminations; nor by the district attorney, nor by any other officer of the United States, for the Constitution has said, in effect, that in no way nor manner shall magistrates or courts issue warrants, except upon proofs, which are to be upon oath and make probable excuse. See *State v. Mitchell*, 1 Bay [S. C.] 267, and 1 Op. Attys. Gen. 229, where Mr. Attorney General Wirt holds that even the President is controlled by this amendment. All arbitrary information, all informations which spring into existence simply because the king and his attorney elected to present them, indeed all informations, except those supported by proof upon oath, which constitute probable cause, by this constitutional provision were expunged from permissible procedures, and the learning about informations was left valuable only as showing what proofs were considered adequate in cases where proofs had to be presented in order to have them acted upon by the judicial discretion or mind.

The master of the crown, whose duties with regard to informations to be sustained by proofs correspond with the district attorneys' of the United States in the courts of the Union, was required to produce to the court "such legal evidence of the offense having been committed by the defendant as would warrant a grand jury in finding a true bill against the defendant, otherwise he will be left to his ordinary remedy by action or indictment." Cole, Crim. Inf. marginal paging 15, 54 vol. Law Library. This is the measure of proof which is held to be requisite by the courts of the United States under the fourth amendment. See *Ex parte Burford*, 1 Cranch, C. C. 276 [Fed. Cas. No. 2,148]. Cranch, J., whose dissenting opinion was adopted by the Supreme Court, said: "It (the warrant) ought to have stated the names of the persons on whose testimony it was granted, and the nature of the testimony, so that this court may know what kind of ill fame it was, and whether the justices have exercised their discretion properly." When the case reached the Supreme Court (3 Cranch, 453 [2 L. Ed. 495]), "the judges of that court were unanimously of opinion that the warrant of commitment was illegal for want of stating some good cause certain, supported by affidavit."

In the matter of a Rule, etc., as to Informations, 3 Woods, 503, Fed. Cas. No. 12,126, Bradley, C. J., held that informations on information and belief were insufficient to justify the issuance of a warrant, and also said:

It is plain from this fundamental enunciation, as well as from the books of authority on criminal matters in the common law, that the probable cause [740] referred to, and which must be supported by oath or affirmation, must be submitted to the committing magistrate himself, and not merely to an official accuser, so that he (the magistrate) may exercise his own judgment on the sufficiency of the ground shown for believing the accused person guilty; and this ground must amount to a probable cause of belief or suspicion of the party's guilt. In other words, the magistrate ought to have before him the oath of the real accuser, presented either in the form of an affidavit, or taken down by himself by personal examination, exhibiting the facts on which the charge is based and on which the belief or suspicion of guilt is founded. The magistrate can then judge for himself, and not trust to the judgment of another, whether sufficient and probable cause exists for issuing a warrant.

This would justify the filing of an information supported by the affidavits, properly taken, of those knowing the facts taken out of court or before officers duly authorized to take affidavits, and not by the judge directing issuance of the warrant. Not much consideration seems to have been given to this point in either of these cases. Judge Bradley seemed to be of the opinion that the "probable cause" referred to is the sworn statement of the facts, and that the oath of the one knowing the facts and setting them forth is to be presented to the judge who is to issue the warrant, but that this may be done in the form of an affidavit taken before any person authorized to take oaths and affirmations, or by an oral examination before the judge who takes down the facts sworn to on such personal examination. On reading the opinion we would infer that the affidavits, if presented to and filed by the judge in support of the information, may be taken before any officer authorized to take and certify oaths and affidavits.

In *United States v. Polite et al.* (D. C.) 35 Fed. 58, information was filed by the United States attorney; but same was not sworn to. It was based on and accompanied by the evidence taken before a United States commissioner who held a preliminary examination in the case. The evidence was not taken before the court or judge with which the information was filed and who directed the issuance of the warrant of arrest. The motion to quash was denied.

It seems to me that it would be a useless expense and formality to require witnesses, in cases where the charge may be prosecuted by information—all cases that may be punished by imprisonment in a penitentiary or state's prison are excluded—to travel long distances, and in many cases from one State to another, and it might be across the continent, for the simple purpose of signing and swearing to an affidavit before the judge holding court and who is to direct the issue of a warrant if the facts sworn to justify and require that it issue. I do not think that the Constitution requires that the oath or affirmation be taken in open court or before the judge holding the court and who is to be called upon to order its filing and the issuance of a warrant. If the information itself states with precision and clearness the commission of a crime which may be prosecuted by information, and charges some person with the commission thereof, giving time and place, and it is supported by the affidavits of persons who know the facts and set them forth, and such facts sworn to justify the allegations of the information, I think it all-sufficient, and that such affidavits may be subscribed and sworn to before any officer in any [741] jurisdiction authorized to take and subscribe oaths and affirmations in criminal proceedings by the laws of the United States. I think the cases all indicate this. I find nothing in the statutes of the United States requiring that prosecution by information conform to the practice of the States respectively in preliminary examinations before committing magistrates. Section 148 of the Code of Criminal Procedure of the State of New York provides that:

When an information is laid before a magistrate of the commission of a crime he must examine on oath the informant and prosecutor and any witness he may produce and take their depositions in writing and cause them to be subscribed by the parties making them.

But this relates to examinations before committing magistrates preliminary to a trial before them or upon which to base a holding for the action of the grand jury, and applies to all crimes of every grade. The information upon which the courts of the United States proceed is now unknown to the law of the State of New York. *People ex rel. Livingston v. Wyatt*, 186 N. Y. 383, 389, 79 N. E. 330, 332, 10 L. R. A. (N. S.) 159. The court says:

Originally an information was a criminal proceeding at the suit of the king without a previous indictment or presentment to a grand jury. It could be preferred only by a responsible public officer when duly supported by affidavit, was limited to misdemeanors, and was a substitute for an indictment. In this sense it is unknown to the law of this State (New York).

In 22 Cyc., 271, 282, the question of verifying informations and supporting them by affidavit is quite extensively gone into; but I find no case holding that they or the affidavits filed in support thereof must be sworn to before the judge directing the issuance of the warrant. It goes without saying that when the matter is regulated by statute, and a particular officer is named before whom the information or affidavit must be sworn to, the statute must be followed. But Congress has not specified any officer or class of officers before whom such affidavits must be taken. If in the district courts of the United States held in New York the practice prescribed by the Code of Civil Procedure is to be followed, the judge, before directing the issuance of a warrant, must examine on oath the informant and pros-

ecutor and all witnesses produced and reduce this examination to writing and cause such deposition to be subscribed by such persons. This would be too cumbersome as well as an expensive proceeding in cases of misdemeanors, and I do not think it was contemplated by Congress when it authorized the prosecution by information of the minor offenses.

In *People v. Vasalo*, 120 Cal. 168, 52 Pac. 305, the defendant was prosecuted by information in the superior court of Los Angeles County which was verified before the clerk of the police court of the city of Los Angeles. The point was raised that such clerk had no authority to administer oaths; but it was held that he had such authority, and the information was held good. The statutes of California did not require that the depositions be taken before the magistrate issuing the warrant. This would indicate that, in the absence of a statute demanding that the oath to an information be taken before [742] the judge or court issuing the warrant, it may be taken before any officer authorized to administer such an oath. 1 Bishop on Criminal Procedure, p. 431, Sec. 604, etc., devotes a chapter to informations; but it is not suggested that the same or the affidavits in support thereof must be sworn to before the judge or court issuing the warrant. See, also, Dig. Law of Cr. Proc., Stephen, 126; "Criminal Information," Wharton Law Dictionary. In Connecticut nearly all crimes are prosecuted by information, and it is common in Indiana. 1 Bishop, Cr. Proc. 38, book 6. In *Miller v. State*, 122 Ind. 355, 24 N. E. 156, it was held that such an affidavit may be sworn to before a notary public; but in that case the information was quashed for the reason the acts of the notary were void because he had not procured a seal as required by statute.

People v. Nowak, 52 Hun, 613, 5 N. Y. Supp. 239, was a case arising before the committing magistrate, and was controlled by section 148, Code Cr. Proc., already quoted.

I do not think section 1014 Rev. St. (U. S. Comp. St. 1901, p. 716), has anything to do with regulating prosecutions by information. That section relates to preliminary examinations before a justice, judge, or United States commissioner for the purpose of issuing a warrant and holding to bail for appearance at court to answer to an indictment presented by a grand jury or to an information filed by the United States attorney, and in such cases, conforming to the practice prescribed by the New York Code of Criminal Procedure, it would be necessary to file a complaint or so-called "information," and for the judge or commissioner to examine the witnesses and reduce their statements to writing and cause them to be subscribed. But an indictment may be found and presented by a grand jury without any preliminary formal complaint or prior arrest, whereupon the arrest follows. So prosecutions for crimes of the nature before referred to may be instituted by the United States attorney who presents to and files with the court when in session an information which must be supported by oath or affirmation and show probable cause and which, in such cases, takes the place of an indictment and thereupon the warrant issues. Under the common law the information was not necessarily verified; but, as stated, this led to abuses and the adoption of the fourth amendment to the Con-

stitution, which in legal effect demands that no warrant shall issue upon an information filed by the United States attorney, unless it states facts, a crime, etc., and is supported by the oath of the officer filing it, who must speak from personal knowledge, or by the oaths or affirmations of others who speak from personal knowledge.

Congress might have provided, when it enacted section 1022, Rev. St. (U. S. Comp. St. 1901, p. 720), stating that certain crimes and offenses "may be prosecuted either by indictment or by information filed by a district attorney," that such information shall be supported by the oaths or affirmations of witnesses taken in open court or before the judge issuing the warrant, or directing its issuance; but it did not, and I do not think the language of the Constitution, above quoted, can be construed to require this. The information is supported by oath or affirmation where it is accompanied by the evidence [743] of witnesses sworn before a United States commissioner on a preliminary examination, if taken in due form and certified by him, or when accompanied by the affidavits made on oath of witnesses sworn before any officer authorized by law to take and subscribe such oaths or affirmations. In my judgment it would be a strained construction to hold that, after a preliminary examination held in due form before a commissioner, where the facts are fully disclosed and the examinations are reduced to writing and sworn to, the United States attorney cannot file an information based on and supported by such evidence and prosecute by information, instead of indictment, without again producing the witnesses in open court on filing the information. I am of the opinion that on filing an information supported by the evidence taken before a commissioner a new warrant would properly issue; that this is true even if such examination were held before a commissioner in another district. If this be true, the Constitution is satisfied when information is filed supported by affidavits duly taken and subscribed before officials authorized to take oaths and affirmations.

But the information presented in this case does not meet these requirements. Letters do not prove themselves. There must be an affidavit showing that the defendants wrote or authorized the letters annexed to the information. The affidavits must contain a venue and, if sworn to before a notary public, must have a certificate attached showing that the person certifying them was at the time a notary public and authorized by the laws of the State or district to take and certify oaths and affirmations, and that same is taken and subscribed as required by the laws of the State or district. If taken before a State judge or justice of the peace, there must be a like certificate, and so of commissioners outside the district where the affidavit is to be used.

For these reasons, I must decline to direct the issuance of a warrant on the information presented.

DISTRICT OF COLUMBIA v. COBURN.¹

(Court of Appeals, District of Columbia, May 26, 1910.)

35 App. D. C., 324.

Section 7 of the Food and Drugs Act, June 30, 1906, which defines when an article of food shall be deemed to be adulterated within the meaning of the act, supersedes and repeals section 3 of the act of Congress, February 17, 1898, covering the same subject. The act of June 30, 1906, repeals the act of February 17, 1898, only to the extent that the earlier act is repugnant to the later act.²

In Error to the Police Court of the District of Columbia. Judgment affirmed.

Mr. Justice ROBB delivered the opinion of the court.

This is a writ of error to the Police Court of the District of Columbia, involving the question whether the provision of the act of February 17th, 1898 (30 Stat. at L. 246, chap. 25), [325] relating to the sale of adulterated or process butter in the District of Columbia, is superseded by the act of June 30th, 1906 (34 Stat. at L. 768, chap. 3915, U. S. Comp. Stat. Supp. 1909, p. 1187).

On August 25th, 1909, an information against the defendant in error, Henry C. Coburn, was filed in behalf of the District of Columbia, charging the said Coburn with selling, and offering for sale, "a certain adulterated article of food, to wit, butter, contrary to and in violation of the act of Congress approved February-17th, 1898, and constituting a law of the District of Columbia." A motion was made to quash the information which was granted, whereupon a writ of error was allowed. Section 3 of said act of 1898 provides, *inter alia*, that an article of food shall be deemed to be adulterated within the meaning of that act, "if it is colored, coated, polished, or powdered, whereby damage is concealed; or if it is made to appear better or of greater value than it really is." Section 7 of said act of 1906 provides, *inter alia*, that an article of food shall be deemed to be adulterated for the purposes of the act, "if it be mixed, colored, coated, or stained in a manner whereby damage or inferiority is concealed."

Process butter is produced from rancid or deteriorated butter, by melting such butter, removing the curd, brine, and scum, blowing air through the butter fat remaining, and then churning the melted fat with an admixture of milk. The mixture is then chilled, ripened, worked, and salted. While the act of 1898 is local in character, and the act of 1906 general, the later act prohibits the sale within the District of Columbia of any article of food mixed in a manner whereby damage or inferiority is concealed. Clearly this provision is sufficiently comprehensive to include the offense herein described; and this being the case, we are constrained to hold that it supersedes the provision of the earlier act covering the same subject. While repeals by implication are not favored, where there is a clear repugnancy between the later and the earlier statutes, they cannot subsist together, for that would amount, in a case like the present, to prescribing two rules to govern a single offense. [326] Weigand v. District of Co-

¹ Not arising under Food and Drugs Act, June 30, 1906.

² See also District of Columbia v. Burns, 32 App. D. C. 203, in which the same question was raised but not decided.

lumbia, 22 App. D. C. 569. Under the act of 1898, this information was required to be brought in the name of the District of Columbia, and the conviction was punishable by a fine of not less than \$5 or more than \$100. The act of 1906 requires the prosecution to be brought by the United States attorney, and the penalty provided in that act is much more severe than the penalty provided in the earlier act. The repugnancy, therefore, of the provisions of the two acts relating to this subject is clearly apparent. It is not likely that the public interests will suffer by this ruling, since the later act apparently affords ample protection against the illegal sale of process butter.

Our attention has been directed to the act of Congress approved May 18th, 1910, entitled "An act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year," etc., in which an appropriation is made to enforce said act of February 17th, 1898. This appropriation, however, merely indicates that it was the intent of Congress to repeal said act of 1898 only in so far as its provisions were repugnant to the provisions of the later act.

The decision must be affirmed, with costs.

Affirmed.

FRENCH SILVER DRAGÉE CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit, June 14, 1910.)

179 Fed. 824; N. J. No. 543.

Confectionery coated with metallic silver *held* not adulterated within the meaning of the Food and Drugs Act, section 7, in the case of confectionery.¹

Error to the Circuit Court of the United States for the Southern District of New York.

The French Silver Dragée Company was convicted of violating the Food and Drugs Act, and brings error. **Reversed.**

Writ of error to review a judgment convicting the plaintiff in error (hereinafter called the defendant) of a violation of Act June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1187), known as the "Pure Food Act."

The indictment alleged the interstate shipment of a quantity of confectionery claimed to be adulterated in that it contained "a certain mineral substance, to wit, metallic silver."

The confectionery in question is sold under the name of "Silver Dragée" and is a small article made of sugar and thinly coated with pure silver. It is used principally by confectioners for decorating boxes of candy. The object of the silver coating is to be conspicuous and the silver is not employed for any purpose of deception. So, for the purposes of this case, the silver coating must be considered as being in no way deleterious or detrimental to health.

The trial judge ruled as follows:

I assume that it has no effect on the result of this case if it were overwhelmingly proved that the administration of pure silver into the human system in

¹ Reversing *United States v. French Silver Dragée Co.*, p. 194, *ante*.

quantities such as are attached to these dragées was perfectly inoperative, and to that statement of what I conceive to be the effect of its action you can take an exception.

Section 7 of the act under which the indictment was framed—the section here in question—is printed in full in the margin¹ and the especially relevant portions thereof follow:

That for the purposes of this act an article shall be deemed to be adulterated: * * *

In the case of confectionery:

If it contains terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt or spirituous liquor or compound or narcotic drug. * * *

The rulings of the trial court were based upon the interpretation of the statute that all it was necessary for the Government to establish—interstate traffic being admitted—was that the confectionery in question contained silver, it being a mineral substance.

[825]² Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, *Circuit Judge* (after stating the facts as above). In interpreting the provisions of the act now in question—the pure food act—it is of importance to ascertain at the outset the objects which Congress sought to accomplish by its enactment and the evils intended to be remedied by it. If we go outside the act itself, and consider the circumstances surrounding its adoption, we find a congressional committee report urging that the objects of the bill were:

(1) To protect the purchaser of food products from being deceived and cheated by having inferior and different articles passed off upon him in place of those which he desired to obtain.

(2) To protect such purchaser from injury by prohibiting the addition to foods of foreign substances poisonous or deleterious to health.

Or, briefly stated, “that which is forbidden is the sale of goods under false pretenses, or the sale of poisonous articles for food.”

Turning now to the act itself: An examination of the title indicates its purposes. It is entitled: “An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines and liquors.” [826] And, examining the particular section now in question, we find the purpose all through it to protect the public from deceit and injury. Drugs are declared to be adulterated if their strength or purity fall below certain standards. The intent to prevent both deceit and injury are here apparent. So food is deemed to be adulterated:

(1) If its quality or strength is reduced by the mixture of other substances;

(2) If one substance has been substituted for another;

(3) If a valuable ingredient has been abstracted;

(4) If it is mixed or colored so that damage or inferiority is concealed;

(5) If poisonous ingredients or ingredients making the article injurious to health are added;

¹ See pp. 824–825, 179 Federal Reporter.

² Numbers in brackets refer to pages of Federal Reporter.

(6) If the article consists of decomposed or putrid animal or vegetable substances.

The obvious purpose of provisions (1), (2), (3) and (4) is to protect the public from deceit and false pretenses; of provisions (5) and (6), from injury to health.

Other sections of the act also indicate the same object. The terms "false," "misleading," "deceive," "poisonous," "deleterious," appear in many places. Indeed, a careful examination of the whole act clearly shows that its object is, as already indicated:

(1) To prevent deceit and false pretenses in food and drugs;

(2) To safeguard the public health.

Bearing these objects in mind, we must now examine the subsection of the Act especially relating to confectionery. If we find upon such examination a possible construction of the provision which would not afford protection to the public from deceit or injury, and would merely stop traffic in an article neither injurious nor capable of deceiving, we should seek to avoid it. General language should not be so construed as to ruin a legitimate business, and yet remedy none of the evils the statute was designed to remove. In the language of the Supreme Court of the United States in *Holy Trinity Church v. United States*, 143 U. S. 457, 459, 12 Sup. Ct. 511, 512, 36 L. Ed. 226:

It is a familiar rule that a thing may be within the letter of the statute, and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.

The interpretation given to the statute by the trial court was that the words "or other mineral substance," following the phrase "in the case of confectionery: If it contain terra alba, barytes, talc, chrome yellow"—broadly included every mineral substance including silver. [827] The defendant, on the other hand, contends that the different clauses of the subsection in question should be construed together and that, so construed, they embrace only those substances which are deceptive or are detrimental to health.

Interpreting the provision as embracing in the phrase "or other mineral substances" all mineral substances whatsoever, it is apparent that the use of the mineral substances, salt, sulphur, and baking soda, in the manufacture of confectionery—and it appears that they are so used—would render the product adulterated within the meaning of the statute and its sale unlawful. Similarly, the use of silver to coat these dragées would violate the act. But the product in which the salt, sulphur, baking soda or silver was used would not be unhealthful, nor would there be any element of deceit present. The provision so construed would arbitrarily prohibit the use of all mineral substances in confectionery, would accomplish thereby none of the purposes of the act, and would apply a different standard in the case of confectionery than in the case of food or drugs. Unless the language of the statute imperatively requires such construction, it should not be adopted by the courts.

The construction of the provision contended for by the defendant is in accordance with the ejusdem generis doctrine. The rule that, when general words follow the enumeration of particular things, such words will be held to include only such things as are of the same kind as those specifically enumerated is, of course, well settled. It is unnecessary to refer to more than one case to illustrate its application. Thus in *Cundling v. City of Chicago*, 176 Ill., 340, 52 N. E. 44, 48 L. R. A. 230, the court said:

The articles, meats, poultry, fish, butter, and lard, which are expressly enumerated in the above paragraph, and the power expressly given therein to regulate the sale thereof, are articles of food for man, and include by the express enumeration of articles only provisions to be used by man. The term "other provisions," by a familiar canon of construction, can extend only to articles of the same character as those especially enumerated. When general words follow an enumeration of particular things, such words must be held to include only "such things or subjects as are of the same kind as those specially enumerated."

We think the ejusdem generis rule especially applicable in this case for the reason—as already pointed out—that any broad construction would arbitrarily interfere with legitimate business and in no way promote the accomplishment of the objects of the statute. Indeed, the Government in its brief in this court seems not to seriously controvert the proposition that the ejusdem generis rule should be applied. It states at the outset:

The only question is whether metallic silver is included in the class "other mineral substances." Is metallic silver ejusdem generis with the mineral substances which precede it?

Now, it appears that terra alba, barytes, and talc are used to mix with confectionery and cheapen it. There is nothing in the record to show that they are injurious to health. They are well-known adulterants—using that term in its ordinary sense. They increase bulk and weight at the expense of quality. Confectionery containing them is [828] really sold under false pretenses. Chrome yellow is a cheap coloring matter, and is poisonous. Silver, as used in these dragées, and as considered in connection with this statute, is not the same kind of mineral substance as terra alba, barytes, or talc. It is used to attract attention, not to deceive. Of course, like those minerals it may be insoluble and inert; but the comparisons to be made must have in view the objects of the statute. Thus similarity within the rule would not be established by showing that the substances were all of the same color. So the silver upon these dragées has no similarity to chrome yellow. Unlike that mineral substance it is not poisonous.

In our opinion the clauses "or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health," following the enumerated substances, should be taken and interpreted together and mean:

(1) That the use in confectionery of terra alba, barytes, talc, or any other mineral substance, whether injurious to health or not, for purposes of deception, makes it unlawfully adulterated;

(2) That the use in confectionery of chrome yellow or other poisonous mineral substance or poisonous color or flavor, makes it unlawfully adulterated;

(3) That the use in confectionery of any ingredient whatsoever which is deleterious or detrimental to health makes it unlawfully adulterated.

It is true that under this construction the third class of cases would include the second. "Any ingredient detrimental to health" undoubtedly includes all poisonous substances. But the clauses do not conflict, and redundancy is not unusual in statutory provisions.

Stated in another way, we think that the history of the act, the objects to be accomplished by it, and the language of all its provisions require that it should be so interpreted that in the case of confectionery, as in the cases of food and drugs, the Government should establish, with respect to products not specifically named, that they either deceive, or are calculated to deceive, the public or are detrimental to health; and, as no proof was offered in this case tending to show that the confectionery in question was either deceptive or injurious, the defendant was improperly convicted.

The judgment of the Circuit Court is reversed.

UNITED STATES *v.* 10 BARRELS OF OLIVES.

(District Court, E. D. Pennsylvania, June 21, 1910.)

N. J. No. 649.

Olives *held* adulterated in that they consisted in whole or in part of a filthy and decomposed vegetable substance.

Libel under section 10 of the Food and Drugs Act. Psaki Brothers, claimants. Jury trial. Verdict for libelant. Decree of condemnation, forfeiture and destruction.

[1] J. B. McPHERSON, *District Judge* (charge to the jury). The attempt of the Government in this case is to forfeit this property, and the method of procedure is, for the Government, if it supposes it has sufficient grounds for believing the act to have been violated, to take possession of the property. Any person who has an interest in that property has a right to come forward and claim it, and claim that the Government's proceeding was not justified; and so we have a case such as is brought before us. While in form it is between the Government and this property, in substance it is between the Government and the man who claims it; so that your verdict in the present case will be for the Government, in case you find that this property should be forfeited, and for the claimant if you find that it ought not to be forfeited. You [2] will not have any money verdict to render, nor anything to do with the value of this property at all. The verdict will simply be, I repeat, in one case for the Government or, in the other case, for the claimant.

One section of this statute provides that articles intended for food may be condemned and forfeited "if, either in whole or in part, they shall be filthy, decomposed or putrid," and the Government claims that, in this particular case, the articles in question were both filthy and decomposed. We will leave the word "putrid" out of the case. There is no averment that they were putrid. If the Govern-

ment has offered evidence which satisfies you that they were either filthy or decomposed, the case is made out. The Government is not bound to prove that they were both filthy and decomposed.

Now you see that what you have to do is, as a question of fact, to determine from the evidence laid before you whether these olives can fairly and properly be said to be filthy or decomposed. That requires you to consider what meaning we can properly apply to the words which I have emphasized, namely, filthy and decomposed, and then apply the meaning to the evidence as you have heard it. Right there we are confronted with the difficulty that so often confronts us, of determining just exactly what the meaning of a particular word is. You know, in the ordinary affairs of life, how difficult it often is to get at the precise meaning which a person who may be talking intends his words to bear, and he may have the same difficulty in getting at what your words may mean. It is a common difficulty that confronts the business man. Language, as you also know, very often means what we intend it to mean. There are very few words which have a precise, technical meaning, always the same. Sometimes they have one meaning and sometimes another. That is a common situation, and we simply have to do with our speech as best we can and endeavor to ascertain what it means in the particular situation in which the words are being used. Sometimes a word may mean one thing in a particular set of circumstances, and have an entirely different meaning, or, at all events, a somewhat different meaning, when applied to another subject.

You must bear in mind that these two words, "filthy" and "decomposed" are used in this case before us with reference to food, with reference to articles that are offered for food and, therefore, you must view the evidence in the light of the subject-matter to which your attention has been directed; because it is quite clear that a situation which might justify a jury in finding a food was decomposed might not justify them in finding that some other substance was either filthy or decomposed.

Now the word "filthy" is capable of a variety of meanings. I suppose it is not unfair to say that it is the superlative degree of such a condition as we refer to as "soiled." When we speak of an article as soiled, that would be a sufficiently accurate statement, I suppose, in your minds and mine. Then if you say an article is "dirty," I think you go a step farther. Perhaps you might call that the comparative degree, for our purposes. It certainly goes a little farther, I think, than the word "soiled." Then, if you use the word "filthy," I think you are all conscious that we have gone a step farther than that. An article can hardly be said to be filthy unless it has gone somewhat further than the word "dirty."

Now what have the witnesses said in regard to these articles? Were they filthy, regarded as articles of food? The point to which the Government directs your attention, and the only point to which the Government directs your attention, in that respect, is the alleged presence of worms and the excreta of worms, which are said to have been found in these barrels. What are the facts in that regard? I do not intend to go over the evidence at all, or to direct your attention [3] to what any particular witness may have said. You have

heard the evidence and you must determine what the facts were, to what extent worms, or the excreta of worms, were found in these olives, and, when you have determined this fact, it may justify you in finding that you can properly regard them as filthy.

So in regard to the word "decomposed." That is a word with quite an extensive scope. Scientifically, it is quite clear that, the moment a chemical change takes place in any article, it begins to decompose. Take sugar, for example. The moment sugar begins to change its character—and it may change into a good many substances—it begins that moment to decompose, to break down, to form other combinations, and that is scientifically called the process of decomposition. It does not follow, however, that the scientific meaning is to be applied to this case. It is quite clear to all of us that it is not intended in this statute to bear a strict scientific meaning; that it should mean simply a change of the chemical constituents of a substance. It is allied, if I may use a general word, to the idea that is connoted by the word "rotten." "Putrid" goes a step farther; but, as I say, we are not concerned with the stage to which the word "putrid" may be properly applied. The sense in which "decomposed" is used in this act means that stage which, if carried somewhat farther, would bring you to the state of a particular substance which would properly be called rotten. I do not think it goes as far as rotten.

Now you can see at once that the word "decomposed," when applied to food—and that is the subject, I call your attention again, to which you must apply these words—the word "decomposed," as applied to food, may have different meanings. What you would call a decomposed food product may have one meaning in one set of circumstances and a different one in another. Take certain cheeses which are used extensively as articles of food. I think on some of them—I shall not name any—there would be a general agreement that they could be properly spoken of as decomposed to some extent; and certainly with regard to some kinds of game that are eaten—eaten, at all events, by epicures—they are undoubtedly decomposed. "High," as you know, is often used for game when it reaches a certain stage. People sometimes do not like it, and sometimes go so far as to call it rotten. In that connection I may say that the act of Congress is not concerned with the question as to whether some people will eat foods that are decomposed or dirty. That is not the test that is applied to them. It is quite true that some people are willing to eat articles that to others would be disgusting, and there is no standard that can be applied generally. In a statute which has been passed by Congress, any word, speaking generally, is to have the ordinary and general meaning which is given to it in common speech. Statutes, speaking generally, you know, are addressed to the people. They are commands to the people, telling them what they shall do or omit to do, and, therefore, it is the ordinary and natural, general, meaning which the words bear, that those words have.

Those are the rules, or principles of construction, of the words with which we are concerned in this case. Their scope and meaning are to be determined as applied to the subject matter of this

statute, namely, with reference to articles of food, and you must apply these rules to the evidence in the case and determine whether these olives, about which we have heard this evidence, are properly to be spoken of as filthy, or properly to be spoken of as decomposed. If they are either one of the two; if either one of the two words is properly applicable to them; if they are filthy, or decomposed, then the Government has made out its case.

[4] This is a proceeding which, as I have said to you, would forfeit this property, that is, take it away from the owner and transfer it to the United States, or authorize the United States to condemn and destroy it; at all events, to deprive the owner of the property. It is, therefore, a severe remedy. It is a penalty, strictly speaking, and, while these proceedings are not criminal proceedings, they are not very far removed in their nature from criminal proceedings. Therefore, a higher degree of proof is required from the United States in a proceeding such as this than would be required of it were it an ordinary money suit on an obligation to the United States. It is not only required that there should be a fair weight of the evidence in favor of the United States, but there is a requirement that the United States should make out its case by evidence that is of a higher quality; evidence that may properly be described as clear, convincing and satisfactory. You now must determine whether, judged by that standard, the United States has made out its case in reference to the articles to which I have referred.

I shall not say anything about the evidence in the case, as it has been given to you by the various witnesses, except to say a word about two of the witnesses who testified for the Government. I refer to the testimony of the two young women who were heard yesterday. Their testimony has been held up before you to ridicule, and I do not think it was justified. There is no reason why the testimony of any witness should not be attacked by any person opposed to it, and it is for the jury to determine what weight is to be given to the testimony of any witness—and the weight to be given to the testimony of these witnesses is entirely for the jury; but I am sure the jury will agree with me that their testimony was not ridiculous, or properly capable of being held up to ridicule. They certainly were highly intelligent witnesses, they certainly were careful witnesses, and I am sure the jury will agree with the court that they were intending, at all events, to give you as much light and as much satisfactory light as was possible for them to do on this subject. Just how far their testimony is to have weight with you, is wholly for you. With that, in connection with all the other evidence in the case, I leave the case for your consideration.

If the jury desire to have any of these samples for inspection, and will let us know, we will be glad to send them out. We will not trouble you with that just now, but if, when you come to consider the case, you would like to have any of these samples, please send us word and we will let you have anything you want.

UNITED STATES v. NINE BARRELS OF OLIVES.

(District Court, E. D. Pennsylvania, June 30, 1910.)

179 Fed. 983; N. J. No. 648.

Olives consisting in whole or in part of a decomposed vegetable substance, held adulterated within the meaning of the Food and Drugs Act, section 7, paragraph 6, in the case of food.

Libel under section 10 of the Food and Drugs Act. Jury waived. Judgment of condemnation and forfeiture.

[984] ¹ J. B. McPHERSON, *District Judge*. The food product under inquiry in this case is black olives imported from Greece. The shipment was seized under the authority of section 10 of the Food and Drugs Act of 1906. (Act June 30, 1906, c. 3915, 34 Stat. 771 [U. S. Comp. St. Supp. 1909, p. 1193].) The importer appeared and claimed the goods, and a trial was had before the court without a jury, in which witnesses were examined and other evidence was produced.

The claimant objects to the jurisdiction of the court on the ground that no preliminary hearing was had by the Secretary of Agriculture in accordance with the provisions of section 4. To this it is enough to reply that section 10 of the act, under which the present seizure was made, is independent of section 4. This has already been decided by Judge Norris in *United States v. 50 Barrels of Whiskey* (D. C.), 165 Fed. 966, and by Judge Dayton in *United States v. 65 Casks, etc.* (D. C.), 170 Fed. 449, and I agree with the result of these decisions. The precise scope of section 4 need not now be determined; it is enough to say for the present that it does not apply to a libel for forfeiture. Under section 10 provision is made for a hearing in court under the well-known process according to the practice of the district court in admiralty, and a preliminary hearing going over the same ground would be superfluous. Of course, if the act required such a hearing, the court would obey the statute; but in my opinion the procedure under section 10 is complete in itself, and is not a mere continuation of the proceeding referred to in section 4.

[985] Another defense is that the claimant has given the bond required by section 11, and that the acceptance of this bond by the Government is equivalent to an official declaration that the olives had been found to comply with the act. I do not so understand the section, which reads as follows:

The Secretary of the Treasury shall deliver to the Secretary of Agriculture, upon his request from time to time, samples of foods and drugs which are being imported into the United States or offered for import, giving notice thereof to the owner or consignee, who may appear before the Secretary of Agriculture, and have the right to introduce testimony, and if it appear from the examination of such samples that any article of food or drug offered to be imported into the United States is adulterated or misbranded within the meaning of this act, or is otherwise dangerous to the health of the people of the United States, or is of a kind forbidden entry into, or forbidden to be sold or restricted in sale in the country in which it is made or from which it is exported, or is otherwise falsely labeled in any respect, the said article shall be refused admission, and the Secretary of the Treasury shall refuse delivery to the consignee and shall cause the destruction of any goods refused delivery which shall not be exported by the

¹ Numbers in brackets refer to pages of Federal Reporter.

consignee within three months from the date of notice of such refusal under such regulations as the Secretary of the Treasury may prescribe: Provided, That the Secretary of the Treasury may deliver to the consignee such goods pending examination and decision in the matter on execution of a penal bond for the amount of the full invoice value of such goods, together with the duty thereon, and on refusal to return such goods for any cause to the custody of the Secretary of the Treasury, when demanded, for the purpose of excluding them from the country, or for any other purpose, said consignee shall forfeit the full amount of the bond: And provided further, That all charges for storage, cartage, and labor on goods which are refused admission or delivery shall be paid by the owner or consignee, and in default of such payment shall constitute a lien against any future importations made by such owner or consignee.

In other words, if an examination is in progress before the Secretary of Agriculture, the importer may take the risk that the result will be what he desires, and may obtain possession of the goods by giving bond to return them in case the result should be adverse. This section does not appear to be so connected with section 10 as to present any obstacle to the remedy by forfeiture.

It only remains to add that, having heard and considered the evidence and the arguments of counsel, I am of opinion, and so find, that the olives in question consist in whole or in part of a decomposed vegetable substance, and should therefore be condemned.

An appropriate judgment may be entered in favor of the United States.

UNITED STATES v. 625 SACKS OF FLOUR.

(District Court, W. D. Missouri, July 6, 1910.)

N. J. No. 722.

Flour bleached by the Alsop process *held* adulterated as a result of such bleaching, and misbranded because of false and misleading statements on the label.¹

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict for the libellant. Decree of condemnation and forfeiture.

[6] SMITH MCPHERSON, *District Judge* (charge to the jury). April 9, 1910, Arba S. Van Valkenburgh, the then United States attorney for this judicial district, in his official capacity as such officer filed with the clerk of this court a pleading designated by law as a libel. Later on, to wit, May 19, 1910, Mr. Van Valkenburgh as such officer as aforesaid filed an amended libel in the name of the United States of America, which in effect charged that the said claimant, the Lexington Mill and Elevator Company, April 1, 1910, sold and shipped from Lexington, in the State of Nebraska, to a grocer by the name of B. O. Terry at and of Castle, in Sullivan County, Missouri, a shipment of flour containing six hundred and twenty-five (625) [7] sacks of flour of forty-eight pounds of flour to the sack. The said libel charges the route of shipment, namely, over two or more connecting railroads between the two said points. The said Terry buying said flour and receiving said shipment for the purpose of retailing said flour to consumers at the said town of Castle and to his customers in the vicinity thereof, and for said purposes the said Lexington Mill and Elevator Company made said shipment.

¹ Reversed, *Lexington Mill and Elevator Co. v. United States*, p. 604, *post*. See also *United States v. Lexington Mill and Elevator Co.*, p. 701, *post*.

It is further charged in the said libel, that is to say, that the flour in question was treated by a process for bleaching flour known as the Alsop process, which process consists of the generation by means of electricity of nitrogen peroxide gas which is mixed with atmospheric air, and the mixture brought into contact with the flour in a state of agitation, and that the flour was thereby caused to be adulterated in certain particulars, namely:

(a) In that substances known as nitrites or nitrite-reacting material has been mixed and packed with the flour so as to reduce and lower and injuriously affect its quality and strength in these respects among others, to wit, that the capacity of the said flour to change and improve as it would have changed and improved if aged by natural processes has been destroyed. That by direct action the elasticity of the gluten has been lessened and impaired so as to injuriously affect the bread-making qualities of the flour; that other constituents of the flour have been injuriously affected so as to reduce, lower, and impair its bread-making qualities.

(b) In that by the treatment of the flour by the Alsop process it has been mixed, colored, and stained in a manner whereby damage and inferiority is concealed in these respects among others, to wit: That the inferiority of freshness or newness, an inferiority which is present in flour freshly milled and which manifests itself, among other things, in inferiorities of color, of elasticity, of gluten, and of the quality of other ingredients which affect its value for bread-making purposes, is thereby concealed; that said flour has been caused to simulate the appearance of flour which has been properly aged and conditioned by natural processes after being milled; that this treatment by the Alsop process has concealed the inferiority of said flour and has given it the appearance of a better grade of flour than it really is, and further that the flour was when milled, when bleached, and now is, of a grade of flour inferior to the flour made from the first quality of hard wheat, and that by the Alsop bleaching process it has been caused to have the appearance of a patent flour and of a flour made from the first quality of hard wheat, and that thereby the inferiority of said flour was and is concealed and that in other respects also the inferiority of said flour was and is concealed.

(c) In that by the treatment as aforesaid the said flour has been caused to contain added poisonous or other added deleterious ingredients, to wit, nitrites or nitrite-reacting material, which may render said flour injurious to health.

The amended libel further charges that said flour is misbranded in substance as follows:

(a) That the bags and sacks containing such flour were labeled as follows: "L. 48, Lexington Cream XXXXX Fancy Patent. This flour is made from the first quality hard wheat."

That in truth and in fact a patent flour is, and is known and recognized to be, the best grade of flour, and which consists only of that portion of the flour content of the wheat known as the "middlings." But that the flour contained in said sacks is not patent flour, but is a grade and quality of flour inferior to patent flour, being a mixture of middlings together with a commercially inferior grade of flour, and a flour which before bleaching was darker in color than a patent flour and inferior in grade, quality, and strength to patent flour, [8]

and that this mixture was shipped into Missouri labeled under the distinctive name of another article, and was labeled so as to deceive and mislead the purchaser, in the respect that it purported to be a patent flour whereas in truth and in fact it is not a patent flour.

(b) That the label on each sack contained a statement, "This flour is made of first quality hard wheat," whereas in truth and in fact the flour was not made of first quality hard wheat, but was milled in the whole or in part from a grade or grades of wheat inferior to first quality hard wheat, namely, "yellow berry," and other inferior wheat, and was sold under the distinctive name of another article than itself, and that the flour seized purported to be made from the first quality of hard wheat, whereas in truth and in fact it was made in whole or in part of wheat inferior to the first quality hard wheat, namely, "yellow berry" and other inferior wheat and therefore was sold under the distinctive name of another article than itself and was misbranded within the meaning of the act of Congress.

To this amended libel which contains the Government's charge and a statement of the alleged cause of action, the Lexington Mill and Elevator Company, claimant, herein, has filed its answer which in substance and meaning states:

That the Lexington Mill and Elevator Company is interested in the flour seized; that the same was manufactured at its mill in Lexington, Nebraska, and sold to B. O. Terry of Castle, Missouri, and was shipped from Lexington, Nebraska, to Terry at Castle, Missouri, under a guaranty that the same was not adulterated; that the claimant has not been paid for the flour, but that after the seizure was required to and did furnish Terry other flour in lieu of the flour seized; that if the flour seized be condemned, claimant will suffer loss to the extent of its value, namely, seven hundred and fifty (\$750) dollars; it admits the shipment of the flour by the route alleged in the libel, and that the flour was branded as indicated by an amendment to the amended libel.

It admits that the flour was treated by a process known as the Alsop process, but denies that the same was adulterated within the meaning of the act of Congress, and denies that any substance known as nitrites or nitrite-reacting material has been mixed or packed with the flour or any part thereof so as to injuriously reduce or lower its quality or strength in any respect whatever, and denies that the flour has been mixed, colored, or stained in a manner whereby damage or inferiority is concealed in any respect whatsoever, and denies that the same has been treated in any manner whereby the grade or the quality of the flour has been concealed, and denies that the treatment of the flour has given it the appearance of a better grade of flour than it really is, and denies that any of the flour is inferior to a patent flour, and denies that any of the same was when milled or now is of a grade of flour inferior to a grade of flour made from the first quality of hard wheat, and denies that the quality of said flour or wheat from which it was made was in any manner concealed, and denies that the same or any portion thereof has been caused to contain any added poison or other added deleterious ingredient which may render said article injurious to health.

It admits and alleges that the flour was labeled as the evidence shows it to have been labeled, but denies that so-called patent flour

is known or recognized to be a grade of flour consisting only of that portion of the content of the wheat known as "middlings," and says that it is not true that the flour contained in said sacks is not a patent flour, or that it is of a grade or quality inferior to patent flour, or that it is a mixture of middling together with a commercially inferior grade of flour, or of a flour which was of a darker color than a patent flour, or inferior in grade, quality, or strength to a patent flour, and denies that the flour was mixed and shipped into Missouri and sold under the distinctive [9] name of another article than itself, or that the same was labeled in any manner so as to deceive or mislead the purchaser, or that it did deceive or mislead the purchaser in any respect whatever.

It admits that the sacks were labeled as the evidence shows them to have been labeled, but denies that the flour was made in whole or in part from grade of soft wheat, or that it was sold under the name of an article different from what it really was, or that it was in any respect misbranded.

It admits that the flour was treated by the Alsop process and in that connection alleges that the process consists of generating, in rapid succession, a flaming electric discharge in a current of air in proximity to such electric discharge, and in conducting the air, as modified by such discharge, into the presence of the flour as it is being continuously passed through a revolving reel or agitator, but denies that the flour was in any way adulterated, or that by the process any poisonous or other deleterious ingredient has in any manner been added thereto or imparted thereto, or that the flour is in any way injurious to health or contains any added deleterious ingredient, or that the same is adulterated in any manner, or that by such process any damage or inferiority is in any manner concealed, or that the quality or strength of the flour is in any manner reduced or lowered.

To this answer the Government by its counsel has filed a reply.

On the issues thus outlined as contained in the amended libel, and the answer and reply, this case is to be determined.

By reason of the libel heretofore referred to a writ of seizure was issued by the order of this court commanding the United States marshal for this district to seize the said shipment of flour and the marshal still holds the same subject to the further orders of the court herein.

The statute under which this proceeding was brought and the case now being tried is an enactment of the Congress of the United States approved by the then President June 30, 1906 (four years ago). This statute as to its validity is challenged by the claimant herein. But with that question you have no concern other than to observe it, because the court holds that the Congress of the United States with the approval of the President had the power under the Constitution of the United States to enact the statute that was enacted and under which we are proceeding, and the court holds and so directs you that the statute is a valid enactment, and to be enforced in any and all cases where the evidence and the facts come within the wording of the statute.

The statute is named "The Food and Drugs Act," and is an act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medi-

cines, and liquors, and for regulating traffic therein, and for other purposes. It will be observed that the statute deals with drugs, medicines, liquors, and foods. A part of the statute is with reference to drugs, medicines, and liquors, and likewise confectionery, but with which in this case we are not concerned except as the same has a bearing with reference to foods. That part of the statute with reference to foods reads as follows:

That for the purposes of this act an article shall be deemed to be adulterated in the case of food:

First: If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

* * * * *

Fourth: If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

Fifth: If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health * * *.

[10] The statute further prohibits the misbranding of articles of food and provides in substance as follows:

That the term "misbranded," as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular * * *.

Any statement or expression of opinion by the court during the trial of this case with reference to any fact or alleged fact or any criticism by the court of any witness or party or counsel on either side, are each and all withdrawn, and you will treat and consider the case as if such statements or criticisms by the court were not made. And I charge you to give no consideration to the same or any part thereof.

You are the sole judges of the facts in this case. Much testimony in this case was given by scientists and experts who testified before you. The testimony of the experts as to their opinion is not binding upon the jury and is merely advisory and may be given such weight by the jury as the jury may deem proper in view of all the facts and circumstances in evidence, or such expert testimony may be wholly disregarded by the jury in arriving at their verdict.

While you are the judges of the facts and of the testimony, and what weight shall be given thereto regardless of expressions of opinion by me, it is my belief that I can be of substantial aid to you in stating some facts which in my opinion are so well established by the evidence as that you ought to have but little or no argument with reference thereto, and take the same as established facts.

However, notwithstanding my statements or expressions of opinion with reference to any fact in the case, you are to remember that you are the sole judges of the facts in the case, and of all deductions to be made therefrom.

It is an established fact and concerning which there is no conflict in the testimony that the flour in question in this case was transported from Lexington, Nebraska, to Castle, Missouri, in interstate commerce and was subject to seizure for confiscation, if it is adulterated or misbranded in any respect or particular alleged in the amended libel.

It is also an established fact in the opinion of the court that the flour seized and in question was made from wheat of a 1909 crop

grown in the State of Nebraska and known by the name of No. 2 Turkey wheat, and that the wheat was ground at the claimant's mill at Lexington, Nebraska, on the night of March 31st, 1910, and shipped the next day to the said Terry at Castle, Missouri, by whom it was received in about seven days.

It is also an established fact in the opinion of the court that the wheat from which the flour was made contained a percentage of what is called yellow berry wheat. The witness, Mr. Tucker, the head miller of claimant, testified that the yellow berry was about or approximately ten to twenty-five per cent of the entire amount of the entire wheat used to make the flour in question that has been seized in this case, and the testimony of other millers in Nebraska and Kansas shows that the wheat called "yellow berry" is frequently indeed commonly found mixed with Turkey wheat as it is grown in those States, and that the percentage of such yellow berry varies, frequently running higher than fifty or seventy-five per cent of the Turkey wheat produced in various places and communities in said States. And there is evidence to the effect that but a small part, probably about one per cent of the Turkey wheat produced, in the various places in these States which are referred to in the testimony, that is wholly free from the yellow berry wheat. And it appears that it is the common practice of millers in Kansas and Nebraska to mill Turkey wheat mixed with this yellow berry.

[11] It is admitted that the flour seized in this case was treated by the Alsop process for the purpose of bleaching and whitening the same; that that process employs a gaseous substance referred to in the testimony as nitrogen-peroxide gas— NO_2 or N_2O_4 .

It appears that nitrogen-peroxide gas is—in concentration—a brownish or yellowish gas heavier than atmospheric air, of offensive odor, corrosive in character, and a poison and deleterious substance, and if taken by a human being in sufficient quantities will produce poisonous action and death.

It appears that when nitrogen-peroxide gas is brought into contact with water or moisture, there is by chemical change produced nitrous acid and nitric acid in equal quantities, and it also appears that each of these acids so produced is a poisonous and deleterious substance which if taken by a human being in sufficient quantities will produce poisonous action and death.

It appears that the water or moisture content of flour is equal to about ten or twelve per cent of the total weight of the flour, amounting to about five pounds of each of the sacks seized or about twenty pounds in a barrel of flour.

It appears that nitrous acid readily combines chemically with other substances such as are contained in wheat flour and thereby forms nitrites of various kinds, depending upon the character of the substances with which the acid chemically combines.

It appears that such nitrites as may be formed by the introduction of nitrous acid into flour are poisonous and deleterious substances, and that if taken by a human being in sufficient quantities will produce poisonous action and death.

It appears that nitric acid readily combines chemically with other substances such as are contained in wheat flour, and thereby forms nitrates of various kinds depending upon the character of the substances with which the acid combines.

To enable the Government to obtain a verdict at your hands in its favor, it is required to furnish such a measure of evidence as to sustain the allegations of the amended libel by a fair preponderance of the evidence. By a fair preponderance of the evidence is meant a greater weight of evidence and it is sufficient if it satisfies your mind that the allegations which it supports are true without regard to which side produces the evidence or the witnesses giving the same. It is not incumbent on the Government to show that the allegations of the amended libel in a case like this are true beyond a reasonable doubt. Proofs beyond a reasonable doubt are only exacted in a criminal case, and this is not a criminal case within the meaning of that rule, but it is an action in the nature of a civil action. You are the judges of the weight of the evidence, and of the credibility of the witnesses, and it is for you to say what the truth is.

It is incumbent on the Government to prove that the flour seized was adulterated and misbranded in *some* respect or particular alleged in the libel. But it need not prove that the flour was adulterated or misbranded in *all* of the respects and particulars alleged. If it appears from the evidence in this case that the flour was adulterated in *any* respect or particular alleged, then you must find for the Government that the same was adulterated, and if it appears in the evidence that the same was misbranded in *any* respect or particular alleged, then you must find for the Government that the same was misbranded. On the other hand, if you find that it was not adulterated in any respect or particular alleged, then you must find against the Government on that issue. And if you find that it was not misbranded in any respect or particular alleged, then you must find against the Government on that issue.

One of the issues submitted to you is the alleged violation of the first subdivision relating to food in section 7 of the act, which in substance declares [12] an article of food to be adulterated if any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

Upon this point the substance of the charges made by the Government is, (a) that the capacity of the flour to change and improve as it would have changed and improved if aged by natural processes, has been destroyed by the treatment of the flour by the Alsop process, whereby substances known as nitrites or nitrite-reacting material have been mixed and packed with the flour; and (b) that by direct action of such process the elasticity of the gluten has been lessened and impaired so as to injuriously affect the bread-making qualities of the flour; and, (c) that other constituents of the flour have been by such process injuriously affected so as to reduce, lower, and impair its bread-making quality.

On the first branch of this particular issue it appears that wheat flour improves by lapse of time and processes of natural aging. I charge you that if the treatment of this flour by the Alsop process for the purpose of bleaching and whitening resulted in any injury to the capacity of the flour to change and improve as it would have changed and improved if aged by natural processes, that your finding must be for the Government that the flour is adulterated.

On the second branch of this particular issue, I charge you that if you find from the evidence that by the direct action and as a result of the treatment of this flour by the Alsop process the elasticity of

the gluten has been lessened or impaired so as to injuriously affect the bread-making qualities of the flour, that your finding must be for the Government that this flour is adulterated.

On the third point of this particular issue, the Government claims that the treatment of this flour by the Alsop process caused substances known as nitrites or nitrite-reacting material to be mixed and packed with the flour so as to reduce, lower, and impair its bread-making qualities, and so as to render the same injurious to health. If you shall find from the evidence that the flour seized was by such treatment so injured, your finding must be for the Government that this flour was adulterated.

The substance of the charges of the Government that this flour is adulterated in violation of the fourth subdivision relating to food of section 7 of the law in question, is that by the treatment of the same by the Alsop process the flour has been mixed, colored, and stained in a manner whereby damage or inferiority is concealed in these respects, namely, (a) that the said flour has been caused to simulate the appearance of flour that has been naturally aged and conditioned by natural processes after milling; (b) that the treatment by the Alsop process has concealed inferiority in said flour, and has given it the appearance of a better grade of flour than it really is; (c) that the flour is of a grade inferior to patent flour and inferior to flour made from the first quality of hard wheat, and that treatment of the same by the Alsop process has caused it to have the appearance of a patent flour and of a flour made from the first quality of hard wheat.

It appears from the evidence in this case that wheat flour when freshly made is inferior to what that same flour will become by the lapse of time and the processes of natural aging and conditioning; that the inferiorities of freshness or newness manifest themselves in inferiority of color, of elasticity of the gluten, and of the quality of other ingredients which affect its value for bread-making purposes; and it further appears that by the lapse of time and aging and conditioning by natural processes wheat flour will improve for a period of time, stated to be from two to four months, or thereabouts; and that such improvement increases the value of the flour and makes it lighter in color; and it [13] further appears that this bleaching process makes the freshly milled wheat flour appear to be like and to simulate the appearance which that same flour will assume after natural aging and conditioning. And it further appears that this flour when seized was not naturally aged or conditioned, but was newly milled flour.

On this branch of this particular issue it is for you to say in the light of all these facts and all the evidence whether or not the inferiority of freshness or newness was concealed by the bleaching process.

On the second branch of this particular issue, I charge you that if treatment by the Alsop process has given to this flour the appearance of a better grade or quality of flour than it really is, you should find for the Government that it is so adulterated.

And upon the third branch of this particular issue, I charge you that if you should find from the evidence that this flour is of a grade of flour inferior to patent flour or is a flour inferior to flour made from the first quality hard wheat, and that bleaching by the Alsop process has caused it to have the appearance either of a patent flour—

as that term will be explained to you in this charge—or the appearance of a flour made from the first quality of hard wheat, then you must find for the Government that this flour is adulterated.

The Government charges adulteration of this flour in violation of the fifth subdivision relating to food of the section of the statute under which we are proceeding. The words of that provision are as follows: "If it (in this case meaning flour) contain any added poisonous or other added deleterious ingredient which may render such article (in this case meaning flour) injurious to health."

The substance of the charge found in the amended libel is that by the treatment of the flour by the Alsop process it has been caused to contain added poisonous and other added deleterious ingredients which may render the same injurious to health, to wit: Nitrites, nitrite-reacting material, nitrogen peroxide gas, nitrous acid, nitric acid, and other poisonous and deleterious ingredients and substances.

It is the claim of the Government that if the flour contain any added poisonous or other added deleterious ingredient of a kind or *character* which may render (that is, which is capable of rendering) such article injurious to health, it is adulterated, and should be condemned for confiscation.

On the other hand, it is the claim of the claimant that even though the flour contain added poisonous or other added deleterious ingredients, it may not be condemned unless it shall further appear that such added substances are in such quantity that the flour shall be thereby rendered injurious to health.

This statute was enacted for the purpose of benefiting and protecting the consumer, which in this case means those who eat bread and cake and pastry and gravy and other products made from wheat flour. This was the purpose that Congress had in mind when it enacted this statute. And in enforcing this statute in proper cases the fact that it will subject the millers to some expense or the fact, if it be a fact, that it will enable the millers to market their flour more readily or at a better price, is entitled to no consideration and will receive no weight at your hands.

It will be noted that the act does not say, "any added poison," but does say, "any added poisonous ingredient." The word "poisonous" as an adjective conveys a descriptive meaning and is used in a qualitative sense, and not in a quantitative sense. That is, it refers to the kind of substance, and not to the quantity of the substance. This idea or meaning is further emphasized and rendered more certain by the qualifying clause "which *may* render such article [14] injurious to health." It does not say, "which *does* render such article injurious to health," but manifestly it was the purpose of Congress to include in this distinction all ingredients of a *poisonous character* to which, in their essential nature, might be ascribed the tendency to affect health injuriously.

This statute is essentially a remedial one, for the correction of known or supposed abuses with respect to the adulteration of food and other articles of human consumption. It is primarily a statute of prevention. Its meaning is made clear when its purpose is known and borne in mind.

It is not conceivable that the Congress of the United States, when it passed this act, intended that producers and vendors might continue to add poisonous and other injurious substances to food so long

as the quantity added was not sufficient to produce observable poisonous or injurious effects upon the health of consumers, nor is it conceivable that Congress intended to require that the Government before proceeding to condemnation of an article of food as adulterated must prove that it contains added poisonous or other added deleterious ingredient in such a quantity as *would* render such article injurious to health. It is known to everyone that there is no method of ascertaining or measuring the effect of the consumption of such substances in food upon the public health or upon the health of any particular individual.

It is clear that it was intended by Congress to prohibit the adding to food of any quantity of the prohibited substances.

The fact that poisonous substances are to be found in the bodies of human beings, in the air, in potable water, and in articles of food, such as ham, bacon, fruits, certain vegetables, and other articles, does not justify the adding of the same or other poisonous substances to articles of food, such as flour, because the statute condemns the adding of poisonous substances. Therefore the court charges you that the Government need not prove that this flour or foodstuffs made by the use of it would injure the health of any consumer. It is the *character*—not the *quantity*—of the added substance, if any, which is to determine this case.

The flour seized in this case is an article of food within the meaning of the act of Congress. And if the treatment of the same by the Alsop process caused it to contain any added poisonous or other added deleterious ingredient of a kind or character which may render the same injurious to health, then it is adulterated and must be condemned.

It is admitted that this flour was treated by the Alsop process for the purpose of bleaching or whitening, and the evidence establishes that nitrogen-peroxide gas was employed for that purpose and further establishes that that gas, nitrous acid, nitric acid, and nitrates of the kind which may be produced by such treatment are poisonous and deleterious substances, and that these substances when taken in sufficient quantities will produce poisonous action or death.

It appears from the evidence in this case that the bleaching process imparts and adds to flour substances referred to in the testimony as nitrates or nitrite-reacting material, and such substances were imparted to the flour seized in this case by the bleaching process. It further appears from the evidence that such substances so imparted or added to this flour are qualitatively both poisonous and deleterious, that is to say, that these substances are of a poisonous and deleterious character.

It is well known that wheat flour is not eaten raw. There is evidence in this case that tends to show that during the process of making bread nitrites or nitrite-reacting material contained in the flour is lessened and may be eliminated under some circumstances, but it is also well known that wheat flour is used for the making of other articles of food—biscuits, dumplings, pastry, cake, crackers, gravy, and perhaps other articles of food—which may be consumed by all classes of persons—the young, the old, the sick, the well, the weak, the [15] strong; and I charge you that it is right for you in reaching your verdict to take these facts into consideration together with all the other proven facts and circumstances in the case.

With reference to the issue as to misbranding, the same divides itself under two heads, one with reference to quality of the flour, and the other with reference to kind of wheat from which it was made. The flour is branded as a fancy patent flour and it is also represented by label on each sack that the flour is made of first quality hard wheat.

There is much dispute in the evidence as to the meaning of the phrase "patent flour." Some of the witnesses for the Government testified in substance that the phrase had a well-defined meaning among millers, bakers, and in the flour market generally, and that it means that the flour so called patent flour, is less than the total flour content of the wheat, and includes what is known in the milling process as the purified middlings, but it is not claimed by the Government nor any of the witnesses that patent flour is or contains any definite or specific percentage of the total flour content of the wheat. On the other hand, some of the witnesses for the claimant testified that the phrase "patent flour" has no definite or recognized meaning among millers, bakers, flour dealers, or elsewhere, and that flours containing the total flour content of the wheat excepting low grade, sometimes called "red dog," are labeled and sold in the market as "patent flour."

It is the law that if the phrase "patent flour" has a well known and well understood meaning generally among millers, flour purchasers, bakers, and in the flour markets of the country, then such meaning as so understood is to be attributed to that phrase. In other words, patent flour is the kind of flour that it is generally understood to be by millers, bakers, flour purchasers, and in the markets generally. You are therefore to determine, first, Has the phrase "patent flour" any well-defined and well-known meaning? And, second, Is the flour seized that kind of flour, namely, "patent flour?" If it is, your finding must be against the Government on this branch of the case. But if it is not a patent flour, as that phrase is understood as heretofore explained, your finding must be for the Government upon this branch of the case.

On the second branch of the charge of misbranding contained in the amended libel, the facts appear to be that the flour seized was manufactured by the claimant at its mill from wheat which was raised in the year 1909 in the general vicinity of Lexington, in the State of Nebraska; that the wheat weighed about fifty-nine pounds to the bushel, and was of a variety known as No. 2 Turkey wheat, in which there was a quantity of wheat known as yellow berry or as sometimes called by millers, "yellow belly," amounting to from ten to twenty-five per cent of the total wheat used to make this flour. The wheat known as yellow berry is commonly found in Nebraska and Kansas growing with Turkey wheat. It differs in color and quality from pure Turkey wheat, and is considered by the millers less desirable and is of less value commercially.

The words upon each sack, "This flour is made of first quality hard wheat," is in effect a representation that the flour seized was made from the best hard wheat.

You are to determine whether or not that representation is true. And in so doing you will not be controlled by the fact, if it be a fact, that the wheat used was the best grown in the district where

claimant procured his supply from milling, but you have a right to consider the same in comparison with other wheats grown in different places and parts of the country as disclosed by the evidence in the case, and in the light of all of the evidence on this question say whether or not the wheat used was in truth and in fact first quality hard wheat.

I am now about committing this case to you gentlemen for decision. We have been engaged in this trial continuously for five weeks of time, during [16] most of which time the weather has been oppressively and well-nigh unbearably hot. Your work, as well as that of all of counsel in the case and my own work, has been exceedingly laborious and fatiguing. I commend you for the patience you have given to the testimony and to the argument of counsel. I have the right to insist and do insist that you now take this case to your room and give both the facts in the case and the law as I have given you in charge your best and most deliberate judgment. In view of statements that have been made by counsel during the progress of this case, you will not consider and you must put to one side all questions of who the counsel are, or where they are from. This is not a contest between States or sections of the country. Ours is but one country, and this enactment by Congress is for the entire country. The fact that the Patent Office at Washington issued a patent for the Alsop process has nothing to do with the question of branding correctly, or misbranding of flour. The fact that the Patent Office issued a patent for the Alsop process does not warrant nor authorize the adulteration of flour as made by the Alsop process if it is adulterated. All these things must be put to one side, and your verdict must be determined in accordance with the law and facts in the case. It is of no importance to you, nor is it of importance to me, who will be pleased or displeased in this case, whether of counsel or of the parties, or of any other person. The only question is, What is the right, and what the wrong of this case?

Your verdict must recite whether this flour was misbranded or not, and your verdict must further recite whether this flour was adulterated or not, within the meaning of what I have heretofore said to you. And that there may be no uncertainty as to your verdicts, I hand you two pairs of verdicts. Your foreman will sign the one of each pair and bring the same into court for record, the other of each pair having been destroyed by you. And you will make no other findings than these two. All matters bearing on these two forms you will give due weight thereto, and all matters not having a bearing thereon, you will utterly disregard.

You will observe that one of these pairs of verdicts I now hand you is with reference to misbranding. If the flour seized was misbranded in any particular as alleged in the amended libel, your foreman will sign the one thus reciting, but if not misbranded in any particular as alleged in the amended libel, your foreman will sign the other. You will also observe that I hand you a pair of verdicts with reference to adulteration. If the flour seized was adulterated in any one of the ways or methods as alleged in the amended libel, your foreman will sign the one reciting the adulteration; if you do not so find, your foreman will sign the other. You will now take the case.

UNITED STATES v. 275 CASES TOMATO CATSUP.

(District Court, S. D. Ohio, July 12, 1910.)

N. J. No. 1044.

In charging adulteration under section 7 of the Food and Drugs Act, paragraph sixth, in the case of food, *held* unnecessary for the Government to allege or prove that an article of food is so "filthy, decomposed or putrid" as to be "unfit for food."

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict in favor of the claimants. On libelant's motion for new trial. Motion granted.¹

HOLLISTER, *District Judge* (on motion for new trial). A libel was filed by the district attorney in the name of the United States against two hundred and seventy-five cases, more or less, of tomato catsup shipped from Indiana into this State, charging that the catsup was "adulterated [2] in violation of the act of Congress of June 30, 1906, known as the Food and Drugs Act, and liable to seizure and condemnation as provided therein, for the reason that each and every bottle and jug in the two hundred and seventy-five, more or less, cases, contains an article of food and food product consisting wholly or in part of a filthy, decomposed and putrid vegetable substance and is unfit for food."

The case was tried and the jury returned a verdict in favor of the catsup and against the Government.

Among the grounds for a new trial these are noticed.

1. The court erred in charging the jury that although they be satisfied that the catsup consisted wholly or in part of a filthy, decomposed or putrid vegetable substance, yet, that would not be sufficient to warrant the jury in bringing in a verdict for the Government, unless they found that the catsup was unfit for food.

2. The court erred in stating to the jury that it could not be said from the testimony where a point is reached when the amount of the bacteria or germs is so great as to bring about decomposition or filthiness or a condition of putridity.

3. The verdict was contrary to the weight of the evidence.

The pure food act of June 30, 1906, U. S. Comp. St. Supp. 1907, p. 928, provides, section 2, that the introduction into any State * * * from any other State * * * any article of food * * * which is adulterated * * * within the meaning of this act is prohibited, and the person shipping the same shall be guilty of a misdemeanor, and under section 10, such adulterated food may be seized, following the procedure as nearly as may be, in admiralty giving the right to either party to have questions of fact tried by a jury.

¹ After the motion of the libelant for a new trial was granted, George Spraul & Co., claimants, withdrew their answers by leave of court, and filed a demurrer to the libel on the ground that the court was without jurisdiction in the premises because no seizure of the catsup had been made by the libelant prior to the filing of the libel. Demurrer sustained and libel dismissed. The United States sued out a writ of error, and on March 7, 1911, the decision of the lower court was reversed by the Circuit Court of Appeals for the Sixth Circuit. (United States v. George Spraul & Co., p. 372, *post*.)

It is provided, section 7—

That for the purposes of this act an article shall be deemed to be adulterated, in cases of food, sixth, if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter.

Section 3 provides, that the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this act including the collection and examination of specimens of food shipped from one State into another, etc., in unbroken packages.

Section 4 provides, that the examination of specimens of food, etc., shall be made in the Bureau of Chemistry of the Department of Agriculture or under its direction for the purpose of determining from such examinations whether the food is adulterated within the meaning of the act.

Section 6 defines the word "food" which shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed or compound.

Under the authority of the act of March 3, 1903, 32 Statutes at Large, 1158, the standards of purity for food products which have been established "vegetables are the succulent, clean, sound, edible parts of herbaceous plants used for culinary purposes."

"Catchup (ketchup, catsup) is the clean, sound, product made from the properly prepared pulp of clean, sound, fresh, ripe, tomatoes, with spices and with or without sugar and vinegar." Greeley, "Food and Drugs Act," p. 147.

The libel having charged that this catsup was "unfit for food," and no objection being made to the inclusion of these words by the defense, and upon the [3] district attorney's statement that the Department of Agriculture directed their inclusion, the court, while expressing doubt, nevertheless concluded to hold the Government to its charge and directed the jury in the way set forth above, and of which the Government now complains.

Upon further consideration and examination of the pure food laws at length, the court is of opinion that the test of adulteration in this case is not to be determined by the answer to the question whether the article complained of is or is not fit for food.

Section 6 covers a number of different offenses. One is, if the food product consists in whole or in part of a filthy, decomposed, or putrid animal substance. Another is if it consists in whole or in part of any portion of an animal unfit for food, or again, if it is the product of a diseased animal, and again if it is one that has died otherwise than by slaughter. The article is adulterated if it consists in whole or in part of a filthy, decomposed, or putrid substance.

This is not a criminal prosecution, and the language in the libel "unfit for food" may be regarded as surplusage because the other language in it completely and distinctly describes an offense. Even in an indictment such superfluous language is not fatal. *Anderson v. United States*, 170 U. S. 481.

The question for the jury to determine was whether this tomato catsup was in whole or in part filthy, decomposed or putrid. Counsel for the defense claims that without the allegations that the catsup

was unfit for food the law could not stand because not a reasonable exercise of police power. Not so. The power of Congress to regulate interstate commerce is involved, not police power. Strictly speaking Congress has no police power. *Keller v. United States*, 213 U. S. 138. The motion on the first ground is sustained.

The testimony of the Government chemists, unrefuted, shows that this catsup contained eighty to one hundred millions of bacteria to the teaspoonful, and yeast germs and mould spores in proportion. Home-made catsup and catsup made at factories with similar care, and choice of material, contain very few. There was evidence that when catsup contains over thirty-seven millions, decay becomes apparent to the taste and smell. The evidence is conclusive that the taste and smell may be overcome by spices and vinegar. This particular catsup was a medium spiced catsup, but sufficiently spiced to overcome the taste and smell, although there was to the taste a flatness which indicated the existence of a change to a spoiled condition. The court misapprehended the testimony when the jury were charged that it did not appear from the testimony where the point is reached when the amount of the bacteria or germs is so great as to bring about decomposition, filthiness or a condition of putridity. The motion on the second ground is well taken.

There was no evidence that the catsup contained anything poisonous or deleterious, and the jury were charged that that was not the test. Although the question of fitness or unfitness for food was also not the proper test, yet, the court is of opinion that catsup such as this is not fit for food, and was surprised at the verdict of the jury. No doubt all food products have in them bacteria and most of them yeast germs and mould spores, and it is the action of these which eventually bring about decomposition, and a point is reached when the article becomes rotten, and if rotten, it is certainly not fit for food although it may be that it is not poisonous or deleterious in the sense that some of it taken into the system does not appear injurious on the ancient theory that every man in his lifetime may safely eat a "peck of dirt." It is not strange that the condition of this catsup was, as one of the chemists said, startling. It was made in this way: tomatoes in large quantities were dumped out of wagons on a platform at the factory. Some attempt was made at separating the rotten tomatoes from the mass; the tomatoes were carried in large quantities by boys [4] into the factory and there placed in wire wicker baskets and immersed in hot water for a short time. The baskets were then placed in front of women or girls, who with knives peeled them and took out the cores. The fine ripe tomatoes were canned and that was the primary purpose of the operation. The cores, the skins, the worm-eaten and insect-bitten tomatoes, the partly green, and some decayed tomatoes were thrown into a trough which from time to time was scraped out by boys. This refuse was put into the pulping machine and subjected to heat. The pulp was made in the summer time and there were more or less decayed tomatoes in the vicinity of the factory and opportunity for flies to carry germs. There were no screens. Reasonable efforts were made to keep the place clean by scrubbing it carefully twice a week. There was testimony tending to show that some whole tomatoes were put in the pulping machine. It does not appear how many and what proportion but the probabilities are that very few whole, ripe, first-class

tomatoes went into the pulping machine. From the pulping machine the pulp was put into old whisky barrels of some 200 gallons capacity and were stored in the cellar and most of the catsup made in the fall and winter following. Some of the barrels exploded because, as is said, they were not air tight, but it was the contents of only those that exploded that were rejected in making the catsup. Apparently the spices and benzoate of soda were added when the time came to actually take the pulp from the barrels to make the catsup, although the maker said that he put up some 20 casks as an experiment and did not use benzoate of soda. This experiment failed, for the catsup spoiled.

The court is of opinion that the verdict was contrary to the weight of the evidence even on the theory that the proof must establish that the catsup was unfit for food.

The motion for a new trial is granted.

UNITED STATES v. MORGAN ET AL.

(Circuit Court, S. D. New York, July 15, 1910.)

181 Fed. 587; N. J. No. 1692.

Ordinary Croton water drawn from the pipes in New York City, filtered and bottled after the addition of small quantities of mineral salts and carbonic acid gas, labeled "Imperial Spring Water," *held* misbranded.

Criminal prosecution by the United States against John Morgan and others. On motion to quash indictment. Motion denied. Jury trial. Verdict of guilty. On motion for a new trial and in arrest of judgment. Motion in arrest granted and the motion for new trial denied on the ground that no conviction could be had under the indictment.¹

HOLT, *District Judge* (on motion for a new trial and in arrest of judgment). These are motions by the defendant for a new trial and in arrest of judgment. The defendants were convicted, under the act of June 30, 1906, commonly called the pure food act, for shipping from New York to New Jersey misbranded bottled [588]² water. The bottles were labeled "Imperial Spring Water." They contained water which was originally ordinary Croton water, drawn from a pipe on the defendants' premises in New York City. This water was first passed through a fine sand filter, then through beds of gravel and charcoal. Then a small quantity of mineral salts was added. It was charged with carbonic acid gas, and put in thoroughly clean bottles. This water when sold was pure and wholesome. A food and drug inspector, appointed by and acting under the Department of Agriculture, whose office was in New York City, went to a druggist at Newark, N. J., and asked for Imperial Spring Water. The druggist had none. The inspector thereupon asked the druggist to order some for him. He did so. In compliance with such order the defendant shipped half a dozen bottles so labeled from New York City to the druggist at Newark, N. J. He thereupon sold them to the inspector, who brought them back to

¹ Reversed, *United States v. Morgan et al.*, p. 494, *post*.

² Numbers in brackets refer to pages of Federal Reporter.

New York and reported the case to the district attorney. The defendants were thereupon indicted for such shipment. There was no evidence on the trial that any notice was given to the defendants of the examination of said water by or under the direction of the Bureau of Chemistry in the Department of Agriculture, or that any opportunity was given to them to be heard on the question whether the pure food act had been violated.

The defendants claim, on these motions, first, that the evidence showed that the water sold was spring water, and therefore that the bottles were not misbranded. The proof showed that ordinary Croton water, like the water of any fresh-water lake or river, is partly spring and partly rain and surface water. The water as treated by the defendants was a thoroughly filtered water, with a little mineral salts and carbonic acid gas added, which made it more sparkling, and, to many people, more attractive. It was perhaps as expensive to produce and as pure and wholesome as spring water. But it was not what is commonly understood by the public as spring water; that is, water taken directly from a natural spring. The label therefore was misleading and the bottles misbranded. The object of the pure food act is not only to protect the public from unwholesome food and drink, but to require that any article of food, drink, or medicine sold shall be correctly described by its label.

The defendants also claim that no judgment should be entered in this case because there is no evidence that they ever made any other shipment of such water in interstate commerce, and the evidence shows that the shipment on which the indictment was based was secretly induced by a Government detective in order to create a basis for a criminal charge. There is no evidence that the defendants ever before sold or shipped water outside of New York City. The inspector who ordered the water at Newark had his office in New York. His only apparent object in going to Newark to order this water was to secretly lure the defendants into an act which would enable him to make a criminal charge against them. This was a perfectly wholesome water, and if there was no other justification for the inspector's proceeding than appears in the evidence, I think his course of action was one of unnecessary zeal. If there were no bottles to be found in other States which had been voluntarily shipped there by the defendants, whatever [589] public evil might result from the sale of such water in New York City might wisely, in my opinion, have been left to be dealt with by the State authorities. The pure food act is a beneficial act; and it will be a matter of regret if the inspectors of the Department of Agriculture arouse hostility to it by excessive zeal to institute trivial prosecutions. But there may have been valid reasons for the course which was taken which did not appear on the trial; and, in any event, I am not willing to hold that because some criticism may perhaps be made on the manner in which the proof was obtained, the proof itself was invalid or insufficient.

The important question on these motions is whether it was necessary for the indictment to allege and for the Government to prove that notice was given to the defendants by the agents of the Department of Agriculture of the examination of the samples obtained of the water, and an opportunity given them to be heard on the question whether the law had been violated.

Sections 3, 4, and 5 of the pure food act are as follows:

SEC. 3. That the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this act, including the collection and examination of specimens of foods and drugs manufactured or offered for sale in the District of Columbia, or in any Territory of the United States, or which shall be offered for sale in unbroken packages in any State other than that in which they shall have been respectively manufactured or produced, or which shall be received from any foreign country, or intended for shipment to any foreign country, or which may be submitted for examination by the chief health, food, or drug officer of any State, Territory, or the District of Columbia, or at any domestic or foreign port through which such product is offered for interstate commerce, or for export or import between the United States and any foreign port or country.

SEC. 4. That the examinations of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of such bureau, for the purpose of determining from such examinations whether such articles are adulterated or misbranded within the meaning of this act; and if it shall appear from any such examination that any of such specimens is adulterated or misbranded within the meaning of this act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such sample was obtained. Any party so notified shall be given an opportunity to be heard under such rules and regulations as may be prescribed as aforesaid, and if it appears that any of the provisions of this act have been violated by such party, then the Secretary of Agriculture shall at once certify the facts to the proper United States district attorney, with a copy of the results of the analysis or the examination of such article duly authenticated by the analyst or officer making such examination, under the oath of such officer. After judgment of the court, notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid.

SEC. 5. That it shall be the duty of each district attorney to whom the Secretary of Agriculture shall report any violation of this act, or to whom any health or food or drug officer or agent of any State, Territory, or the District of Columbia shall present satisfactory evidence of any such violation, to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the penalties as in such case herein provided.

The claim that the indictment was invalid on its face because it did not allege that notice of the examination and opportunity to be heard was given to the defendants is, I think, untenable. There is obviously [590] at least one case in which a prosecution is authorized when no preliminary investigation has been had by officers of the Department of Agriculture. The 5th section provides that it shall be the duty of the district attorney to prosecute whenever any State health officer presents satisfactory evidence of any violations of the act. Moreover, the first and second sections, making it a misdemeanor to manufacture in the Territories or District of Columbia, or to ship in interstate commerce, adulterated or misbranded foods or drugs, are general in their terms. The act prohibited constitutes the misdemeanor. There is no direct reference in them to the subsequent sections providing for the notice to the owner of the samples and the opportunity to be heard; and in my opinion the district attorney can institute prosecutions under those sections, upon adequate evidence, without any preliminary investigation or action by the officers of the Department of Agriculture. But under the provisions of section 4 of the act, whenever an investigation is first instituted by the food and drug inspectors or other agents of the Department of Agriculture or of its Bureau of Chemistry, and an examination of specimens of foods or drugs had for the purpose of determining whether

they have been adulterated or misbranded, notice of the examination and an opportunity to be heard must have been given to the party from whom the sample was obtained. In my opinion a compliance with this section is a prerequisite to a prosecution in all cases in which the matter is brought before the district attorney for prosecution by the agents of the Department of Agriculture. Proof of such notice and opportunity to be heard before the indictment is therefore material in all such prosecutions; and, of course, all material facts which are necessary to sustain a conviction must be alleged in the indictment. The result is that although an indictment under the pure food act is not demurrable because it contains no allegation of such notice and opportunity to be heard, since such prosecutions can be maintained by the district attorney without the intervention of the officers of the Department of Agriculture, such allegations and proof are necessary in all cases where the prosecution is instigated by such officers; and, if it appears by evidence on the trial that the case is such, no conviction can be had in the absence of such allegation and proof. In this case, the investigation and prosecution were due to such officers. I think therefore that the indictment should have alleged and the evidence for the Government established that such notice and opportunity to be heard were given to the defendants and that, in the absence of such allegation and proof, the motion in arrest of judgment should be granted. The motion for a new trial should be either withdrawn or denied. If granted a new trial would result in nothing, because, in my opinion, the indictment is fatally defective.

UNITED STATES v. 74 CASES OF GRAPE JUICE.

(District Court, W. D. New York, July 15, 1910.)

181 Fed. 629; N. J. No. 1045.

The notice to the person from whom the sample was taken and opportunity to be heard, provided for by section 4 of the Food and Drugs Act, are necessary conditions precedent to prosecution and must be alleged and proved in all cases instituted in the United States Department of Agriculture, whether criminal or in rem, but under section 5 a district attorney may institute such a proceeding upon complaint of any State health officer or any adequate proof without the action of the agents of the department.

Libel under section 10 of the Food and Drugs Act. On demurrer to libel. Demurrer overruled.¹

[630]² *HOLT, District Judge.* This is a demurrer to a libel filed to forfeit 74 cases of grape juice on the ground that they were adulterated and misbranded, in violation of the act of June 30, 1906, commonly called the "pure food act." The grounds of demurrer alleged are that the libel fails to allege that notice of the examination of the samples made in or under the direction or supervision of the Bureau

¹ This case subsequently came on for trial before Holt, *District Judge*, and a jury, and the court on motion for the proctor for the claimant, directed the jury to return a verdict for the claimant on the ground that no notice had been given to the parties interested, as required by section 4 of the act, prior to the filing of the libel. Verdict was rendered accordingly and an appeal was taken by the United States to the Circuit Court of Appeals for the Second Circuit. The judgment of the lower court was affirmed by the Circuit Court of Appeals. *United States v. 74 (or 20) Cases Grape Juice*, p. 413, *post*.

² Numbers in brackets refer to pages of Federal Reporter.

of Chemistry in the Department of Agriculture was given to the claimants, and an opportunity to be heard afforded them, as provided in section 4 of the act, and that the act itself is unconstitutional.

This is a proceeding in rem, under section 10 of the act, for the forfeiture of the goods alleged to have been adulterated and misbranded. It has been held in *United States v. 50 Barrels of Whisky* (D. C.) 165 Fed. 966, and *United States v. 65 Casks of Liquid Extracts* (D. C.) 170 Fed. 449, and in some other unreported cases, that the provisions of section 4 requiring notice of the examination of the goods by Federal officers to be given to the party from whom the samples have been taken, and an opportunity to be afforded such party to be heard, apply to suits in personam to recover penalties under section 5 only, and not to suits in rem to forfeit the goods under section 10. With the highest respect for the eminent judges who have reached this conclusion, it seems to me at least doubtful. Section 5, to which it is admitted that the provisions of section 4 apply, requiring such notice to be given and such opportunity to be heard afforded, does not in terms provide that the prosecutions instituted after such notice has been given and such opportunity to be heard afforded shall be prosecutions in personam only. It provides that it shall be the duty of the district attorney "to cause appropriate proceedings to be commenced and prosecuted * * * for the enforcement of the penalties as in such case herein provided." The word, "herein" here means in any part of the entire act. A statute which provides for the forfeiture of goods for a violation of law imposes a penalty just as much as a statute which provides for a fine for such violation. Moreover, the eleventh section of the act provides, in the case of imported goods, that samples shall be delivered to the Secretary of Agriculture, and that notice shall be given to the owner or consignee who may appear before the Secretary of Agriculture and give testimony, and, "if it appears from the examination of such samples that any article of food or drug * * * is adulterated or misbranded," the said article shall be refused admission, and the Secretary of the Treasury shall cause the destruction of such goods if not exported by the consignee within three months.

If Congress thought it proper to provide that an importer is entitled to a preliminary notice and hearing before his goods can be refused admission and if not exported, destroyed, I can not see why it did not intend the same protection for a citizen whose goods it is proposed to [631] forfeit and destroy. But it is unnecessary to decide this question upon this demurrer, for I think it should be overruled on another point. The ground of demurrer under consideration assumes that there can be no prosecution of any kind under the pure food act without such preliminary notice and opportunity to be heard. But this obviously is not so. The fifth section authorizes prosecutions upon the complaint of any State health officer, and, in my opinion, the district attorney can institute such a prosecution, upon any adequate proof, without the action of the agents of the Department of Agriculture. When, however, the officers of the Department of Agriculture first bring the matter before the district attorney, I think that the notice must be given and the opportunity to be heard afforded provided for in section 4 before an indictment can be found. In all such prosecutions therefore the indictment or

libel must allege, and the evidence establish, that such notice was given and such opportunity to be heard afforded before the prosecution was instituted. As the libel in this case may have been instituted by the district attorney without the intervention of the agents of the Department of Agriculture, I think the demurrer on the ground under consideration should be overruled.

The point that the pure food act is unconstitutional has been ably argued in the claimants' brief. If it were an original question, the claim that this act is really an attempt to exercise the police power, which resides wholly in the States, would be entitled to careful consideration. But, in my opinion, the underlying principle governing the question has been decided. The Lottery Case, 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492, held that an act of Congress prohibiting the transportation in interstate commerce of lottery tickets was constitutional. I can see no difference in principle in the two cases. So the acts providing for the humane treatment of animals transported in interstate commerce, the acts making it a criminal offense to use the United States mails in the prosecution of a fraudulent scheme, or for the transportation of obscene publications, and many similar statutes, all rest on the same basis. Congress having exclusive power to regulate interstate commerce and the postal service, it can prohibit their use for the prosecution of any fundamentally objectionable business. The selling of adulterated or misbranded articles of food, drink, or medicine is as unmitigated an evil as the sale of lottery tickets or counterfeit money or obscene publications. At all events, the pure food act is a beneficial one; many convictions have been had under it in many courts; and a court of first instance should not hold such a statute unconstitutional except upon clear grounds.

The demurrer is overruled, with leave to the claimants to answer within 20 days upon payment of costs.

UNITED STATES v. EIGHT PACKAGES OR CASKS OF DRUG PRODUCTS.

(District Court, S. D. Ohio, August 15, 1910.)

N. J. No. 697.

Held, that in proceedings in rem instituted by the United States under section 10 of the Foods and Drugs Act, the court is without jurisdiction unless the goods are seized by the executive officers prior to the filing of the libel;¹ the libel must be supported by the oath or affirmation of some person having knowledge of the facts,² and must allege that the goods proceeded against were shipped *for sale*.³

Libel under section 10 of the Food and Drugs Act. On demurrer to libel. Demurrer sustained. Libel dismissed.

[2] *HOLLISTER, District Judge.* The libelant represents that certain packages and casks of drugs are labeled marked and branded on the outside in a certain way. The marking on each is described, the

¹ Contra, *United States v. 100 Barrels of Vinegar*, p. 448, *post*; and *United States v. George Spraul & Co.*, p. 372, *post*.

² Contra, *United States v. Two Barrels of Desiccated Eggs*, p. 388, *post*; and *United States v. 300 Cases of Mapleine*, p. 190, *ante*.

³ Contra, *Hipolite Egg Co. v. United States*, p. 378, *post*.

descriptions differing only in the designated numbers of each, and it may suffice to quote the marking and branding of one.

Prescription Products Company, Dayton, Ohio, S. 59884, P. D. Co. No. (1):

The casks or packages are represented as being within and on the premises of the Prescription Products Company in Dayton, Ohio, and owned by or in the possession of that Company for the purpose of being used and manufactured, sold and consumed as drugs.

It is represented that these packages are misbranded within the meaning of section 8, paragraph 2, under the title "Drugs," of the act of Congress of June 30, 1906, 34 Stat. at L. 768, and are liable to condemnation for the reason that each package and cask fails to bear a statement on the label of the quantity and proportion of any alcohol or any derivatives or preparation of alcohol contained therein, and that each of the packages and casks contain a certain percentage of alcohol as set forth in the libel.

It is alleged that they have been and were transported from Detroit to Dayton, and are now in the original unbroken packages as the same were transported, and the libellant prays that they be proceeded against and seized for condemnation in accordance with the act of Congress, and according to the course of this court in cases of admiralty and maritime jurisdiction, so far as it is applicable, and that they may be adjudged and decreed misbranded and be condemned as provided by law.

The act of June 30, 1906, provides, section 10—

That any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act, and is being transported from one State, Territory, District, or insular possession to another for sale, or having been transported, remains unloaded, unsold, or in original unbroken packages, or if it be sold or offered for sale in the District of Columbia or the Territories, or insular possessions of the United States, or if it be imported from a foreign country for sale, or if it is intended for export to a foreign country, shall be liable to be proceeded against in any district court of the United [3] States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. And if such article is condemned as being adulterated or misbranded, or of a poisonous or deleterious character, within the meaning of this act, the same shall be disposed of by destruction or sale, as the said court may direct, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States, but such goods shall not be sold in any jurisdiction contrary to the provisions of this act or the laws of that jurisdiction; *Provided, however,* That upon the payment of the costs of such libel proceedings and the execution and delivery of a good and sufficient bond to the effect that such articles shall not be sold or otherwise disposed of contrary to the provisions of this act, or the laws of any State, Territory, District or insular possession, the court may by order direct that such articles be delivered to the owner thereof. The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States.

The claimant demurs on four grounds which will be taken up and disposed of seriatim.

1. "The court is without jurisdiction inasmuch as it appears from said libel that no seizure of the goods therein mentioned had been made prior to the filing of said libel."

It has been the practice in this jurisdiction for seizures of goods for alleged infringements of the food laws to be made on warrant issued after the libel. This is probably the universal practice in such cases.

The question so far as it relates to the food act has not been passed upon by any of the courts, so far as this court is aware. But it is not a new question in admiralty or in the many cases in which seizure and forfeiture of goods have been sought under navigation revenue, and other laws of the United States.

Upon first impression, and having regard to the punctuation of the act, it would seem that the article is to be seized for confiscation by a process of libel for condemnation in any district court within the district where the same is found, the basis for the seizure being the libel on which the warrant of seizure is issued. If there were no other light to be had upon the subject, the conclusion might easily be reached that it would be sufficient for a warrant of arrest to follow the libel, the filing of which gives the court jurisdiction. But it has been the rule in proceedings in rem ever since the declaration of Mr. Justice Story in the *Brig Ann*, 9 Cranch, 288—

that before judicial cognizance can attach upon a forfeiture in rem, under the statute, there must be a seizure; for until seizure, it is impossible to ascertain what is the competent form.

In that case the nonintercourse and nonimportation act directed against Great Britain and France March 1, 1809, 2 Stat. at L. 528, was involved, section 5 provided—

That whenever any article or articles, the importation of which is prohibited, by this act, shall, after the twentieth day of May, be imported into the United States, * * * contrary to the true intent and meaning of this act, or shall, after the said twentieth of May, be put on board of any ship or vessel, boat, raft or carriage, belonging to the owner of such prohibited articles, shall be forfeited; and the owner thereof shall moreover forfeit and pay treble the value of such articles.

Section 8 gave authority to every collector and other enumerated officer to seize the goods and to—

keep the same in custody until it shall have been ascertained whether the same have been forfeited or not.

Section 18 provides—

That all penalties and forfeitures arising under or incurred by virtue of this act, may be sued for, prosecuted and recovered, with costs of suit, by action of debt, in the name of the United States of America, or by indictment or information in any court having competent jurisdiction to try the same.

Mr. Justice Story said what he did after a consideration, not of the particular statute under which the seizure was made or attempted to be made in that case, but from a [4] consideration of the judiciary act of 24th of September, 1789, ch. 20, sec. 9, which conferred jurisdiction upon the district court, and which says those courts are vested with—

exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made on waters navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas.

In determining the question of the jurisdiction of the court, Mr. Justice Story said—

It seems manifest * * * that the jurisdiction as to revenue forfeitures, was intended to be given to the court of the district, not where the offence was committed, but where the seizure was made. And this with good reason. In order to institute and perfect proceedings in rem, it is necessary that the thing should be actually or constructively within the reach of the court. It is actually

within its possession, when it is submitted to the process of the court; it is constructively so, when, by a seizure, it is held, to ascertain and enforce a right or forfeiture which can alone be decided by a judicial decree in rem. If the place of committing the offence has fixed the judicial forum where it was to be tried, the law would have been, in numerous cases, evaded; for, by a removal of the thing from such place, the court could have no power to enforce its decree. The legislature therefore, wisely determined that the place of seizure should decide as to the proper and competent tribunal.

It seems clear that the "statute" to which that great judge referred was the judiciary act, the terms of which he was considering. This court is not alone in that view. The case, *Silver Spring* No. 12858 Fed. Cases, is reported to have been brought under the act of July 29, 1813, ch. 35, Sec. 5-7. That act (3 Stat. at L. 49-50-51-52) seems to have been limited in its operation to February 17, 1816, while the libel charges fraud and deceit of obtaining the bounty to have been perpetrated in the summer of 1853, but it must be assumed to have been in force when it was sought to condemn the fish, etc., in the year 1854. It will be noticed that the act does not provide for a seizure, although it does provide for a forfeiture.

The claim of counsel for the defendant in that case based on the judiciary act, and Mr. Justice Story's decision that the action must fail because no seizure of the property was alleged in the libel, was sustained by Judge Sprague of the District Court of Massachusetts, who, speaking of the decision in the *Brig Ann*, said—

The decision in that case did not depend upon the construction of the particular statute under which the property thus became forfeited, but upon the construction of the act of 24th of September 1789 ("the judiciary act") which is equally applicable to the present proceeding and, therefore, the rule laid down by the Supreme Court in that case "that before judicial cognizance can attach upon a forfeiture in rem, there must be a seizure," must govern the present case.

The question was before Judge Drummond in the *May*, 9330 Fed. Cases, and while he was evidently not satisfied with the reasons for the rule, yet he felt compelled, upon a consideration of the judiciary act, the navigation act of 1871 and the decision in the *Brig Ann*, to rule that an actual seizure of the res prior to the filing of the libel is essential to the jurisdiction of the Federal Courts, and that the libel should state the place of seizure. The learned judge also states the fact to be that the twenty-second rule in admiralty was adopted by the Supreme Court in conformity with the view of Mr. Justice Story in the *Brig Ann*.

The judiciary act as it now reads, 1 Comp. Stat. 1901, 457, gives jurisdiction to the district courts.

Eighth. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it; and of all seizures on land and on waters not within admiralty and maritime jurisdiction.

[5] If this section is construed as the judiciary act was construed in the *Brig Ann*, and it would seem it ought to be, the conclusion is inevitable that jurisdiction is based upon the seizure, and for the same reasons as were given in that case as well as those to which reference will be made.

In every one of the cases arising under the laws of the United States providing for seizure, forfeiture, confiscation, and condemnation, whether they are revenue laws or navigation laws or laws pro-

viding for confiscation of certain property in times of war or rebellion, the rule is universally declared whenever the question was raised, that the matter of seizure is jurisdictional and that the libel follows, through which it may be determined whether the seizure was legal or not.

In *Gelston v. Hoyt*, 3 Wheat. 247, the act of February 18, 1793, 1 Stat. at L. 305, was under consideration Sec. 27 of which provided that an officer of the revenue might go on board a ship within or without his district, and if it should appear that any breach of the laws of the United States had been committed whereby the ship or goods on board might be liable to forfeiture, to make seizure of the same.

Mr. Justice Story at 318, says with respect to proceedings in rem—where the property is seized and libelled, as forfeited to the Government, the sole object of the suit is to ascertain whether the seizure be rightful, and the forfeiture incurred or not.

The Food and Drugs Act, sections 3, 4, and 5, make provisions for an examination of specimens of food and drugs offered for sale in unbroken packages in any State other than that in which they may have been manufactured or produced, and if any of the provisions of the act have been violated, the Secretary of Agriculture shall certify the facts to the proper district attorney with a copy of the results of analysis or examination, and it is made the duty of each district attorney—

to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States without delay for the enforcement of the penalties.

What are the penalties? The whole act has in view seizure, forfeiture, condemnation, and confiscation, and in that respect does not differ in the slightest from all other acts the court has examined providing for seizure, forfeiture, condemnation, and confiscation under various admiralty and revenue and other laws of the United States.

Among the cases which may be examined with profit are: *United States v. 92 Barrels of Rectified Spirits*, 8 Blatch. 480; *U. S. v. One Raft of Timber*, 13 Fed. 796; *The Lewellen*, 4 Biss. 156; *Hatch v. Steamboat Boston*, 3 Fed. 807; *United States v. Winchester*, 99 U. S. 372, 376; *Clifton v. United States*, 4 Howard 242; *Coffey v. United States*, 116 U. S. 427, 435; *The Washington*, 17221 Fed. Cases; *The Josefa Segunda*, 10 Wheaton 312; *Fideleter v. United States*, 1 Sawyer 153; *Dobbins Distillery v. United States*, 96 U. S. 395, 396; *The Bolina*, 1608 Fed. Cases; *The Idaho*, 29 Fed. 187, 190; *The Rio Grande*, 23 Wallace 458; *Miller v. United States*, 11 Wall. 268, 294, 295, 296; *Windsor v. McVeigh*, 93 U. S. 274, 278, et seq. In *re Moore*, 66 Fed. 950.

In fact, in some of the cases in which the same rule was adopted there was no provision for forfeiture or seizure of the property. *The Lewellen*, 4 Biss. 156; *Hatch v. Steamboat Boston*, 3 Fed. 807. Such was the *Bolina*, 1608 Fed. Cases.

Full authority is found in that case for a seizure by the district attorney, or under his authority, even if the statute had been silent on the subject, and in the opinion Mr. Justice Story said—

But if there had been no mode of prosecution provided, I should have had no doubt that an information would have lain upon common-law principles.

Under the Food and Drugs Act the steps provided are the same and just as drastic in their results as in any of the other cases. In

the case under the consideration "The sole object of the suit is to ascertain whether the seizure be rightful and the forfeiture incurred or not," just as much as in all of the other cases in which the statute expressly [6] gives some officer the power to seize the offending article. It would serve to no useful purpose to go at length into the many cases cited by counsel and found by the court, in which revenue laws, navigation laws or laws for providing for confiscation in times of war and rebellion were under consideration. They all announce the same rule, that when it is sought to declare a forfeiture of goods for a violation of some law of the United States, and the proceeding is strictly in rem, the seizure must be made prior to the filing of the libel, and the libel must allege the fact.

This conclusion is not to be affected by questions of punctuation. If the comma after the word "found" is omitted, the language will be found to contain all the elements found in other statutes considered in the cases referred to. If the comma is transposed and put after the word "seized" then there could be no doubt that the intention of the statute was that the same proceeding should be had as in admiralty in cases providing for seizure. Punctuation may not be regarded in construing a statute. *Cushing v. Worrick*, 75 Mass. 382; *Martin v. Gleason*, 139 Mass. 183. "But for the punctuation as it stands," says Judge Day in *Hamilton v. Steamboat Hamilton*, 16 U. S. 428, "there could be little doubt but that this was the meaning of the legislature. Courts, will, however, in the construction of statutes, for the purpose of arriving at the real meaning and intention of the law makers, disregard the punctuation, or repunctuate, if need be, to render the true meaning of the statute."

It cannot be that when without the comma, or with the comma after the word "seized", the act would be in its operation in conformity with all similar legislation, that Congress by putting the comma after the word "found" intended to change the whole course of established procedure.

It is interesting to notice that the act of March 3, 1807, ch. 77, sec. 4, considered in the *Josefa Segunda*, 10 Wheaton, 312, the language with respect to the property to be confiscated was—

shall be liable to be seized, prosecuted, and condemned * * * in the district where the said ship or vessel *may be found or seized*. * * *

There are good reasons why in such cases as this the seizure should precede the libel. It will be observed that the offence may be committed while the article "is being transported * * * or having been transported remains unloaded, unsold, or in original unbroken packages." Let a case be assumed in which the proper authorities have information that foods misbranded in violation of the act are on the cars in the Northern District of Ohio en route to Dayton in the Southern District. If the district attorney in the Northern District be apprised by the Secretary of Agriculture after an examination, that certain goods are misbranded, filed his libel within his jurisdiction, and by it seeks seizure of the article, it is very apparent that long before the libel may be prepared and the warrant of arrest issued and served, the goods may be without the jurisdiction of the court and the libel a futility. But if on the other hand, the district attorney in the Northern District of Ohio who causes a warrant of seizure upon information lodged in the proper court, to issue, and

thereupon the goods were seized in his district, can it be doubted that the court in the jurisdiction in which the seizure was made would acquire jurisdiction of the case? Again let it be assumed that the goods have arrived in Dayton and remained in the unbroken packages, and being misbranded are forfeited under the law. The district attorney for the Southern District of Ohio filed his libel and a writ of seizure is issued. Let it be assumed that before his libel is prepared and filed and the writ issued and served, the goods have been sold by the Dayton consignee and transported to a *bona fide* purchaser in the Northern District of Ohio or in some other State, of what avail would the libel be then? The court could certainly not proceed to condemn and forfeit the misbranded article.

It is an established rule that a proceeding *in rem* is notice to the world. *Mankin v. Chandler*, 2 Brock. 125, 127, Marshall, C. J. If the proceeding is not instituted until [7] the libel is filed then a *bona fide* purchaser has no notice actual or constructive. It is easy to see how upon goods actually forfeited by a commission of the offence a lien to a *bona fide* purchaser might be put, or a sale made, which would render a libel seeking a forfeiture a vain thing.

Under section 68 of the internal revenue act, June 30, 1864, 13 Stat. at L. 248, providing for the forfeiture of liquors and spirits, and the seizure of the same for violation of internal revenue laws, it was held that a factor's lien was protected where *the bona fides* are unquestioned, if the lien was subsisting at the date of the seizure. *United States v. 396 Barrels of Distilled Spirits*, 16504 Fed. Cases.

The purposes of the Food and Drugs Act and of seizures, condemnations, and forfeitures under it are the same as the purposes of the other acts of the Government seeking the enforcement of laws of the United States by seizure, condemnation, and forfeiture of the property and goods which by the laws are made contraband, and there seems to be no reason why the proceedings in this case should differ from the proceedings in cases of similar purport and intention.

The demurrer on the first ground will be sustained.

2. "Said libel is not properly verified by any person having knowledge of the facts."

The claim is, that the proceedings of seizure and forfeiture are criminal in their nature, and that the warrant should be of the character contemplated by the fourth amendment to the constitution, which reads—

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

It is claimed that the probable cause must be supported by oath or affirmation of some one conversant with the facts which must be submitted to the magistrate issuing the warrant so that he may determine whether probable cause exists.

It was the opinion of Chief Justice Marshall, that a proceeding in forfeiture of a vessel is a civil cause. *The Vengeance*, 3 Dallas, 297, he says at 301—

We are unanimously of opinion that it is a civil cause. It is a process of the nature of a libel *in rem* and does not in any degree touch the person of the offender.

The same great authority expressed the same view in the Schooner *Sally*, 2 Cranch, 406; The *Samuel*, 1 Wheaton, 10, and in the *Betsy* and *Charlotte*, 4 Cranch, 442.

It is said by Mr. Justice Clifford in *Dobbins Distillery v. U. S.* 96 U. S. 395, 399—

cases arise undoubtedly, where the judgment of forfeiture necessarily carries with it, and as part of the sentence, a conviction and judgment against the person for the crime committed; and in that state of the pleadings it is clear that the proceeding is one of a criminal character; but where the information, as in this case, does not involve the personal conviction of the wrong-doer for the offence charged, the remedy of forfeiture claimed is plainly one of a civil nature; as the conviction of the wrong-doer must be obtained, if at all, in another and wholly independent proceeding.

This would seem to settle the question, but there is a long list of cases beginning with *Boyd v. United States*, 116 U. S. 616, 634, which hold that proceedings in seizure and forfeiture are so far criminal as to come within the meaning of the fourth amendment. *Lees v. United States*, 150 U. S. 480; *Stone v. United States*, 167 U. S. 178, 187; *State v. Chicago*, 37 Fed. 497, 500; *State v. Day Land, etc.*, 41 Fed. 228, 230; *United States v. Two Barrels of Whiskey*, 96 Fed., 116 U. S. 434; *Clifton v. United States*, 4 Howard, 242, 250.

The question in *Boyd v. United States*, was whether or not in an action *in rem* to establish a forfeiture of goods alleged to have been fraudulently imported without paying duties, an order of court based on the fifth section of the act authorizing the proceeding which required the claimants of the goods to produce a certain invoice in court for the inspection of the Government attorney and to be offered in evidence by him, was constitutional or not. Section five was held to be unconstitutional. [8] Mr. Justice Bradley at page 634 says—

as, therefore, suits for penalties and forfeitures incurred by the commission of offences against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the fourth amendment of the Constitution, and of that portion of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; and we are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the fifth amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the fourth amendment.

The propriety of these views has not been questioned, so far as this court after much research has been able to ascertain, and they are summed up by Mr. Justice Harlan in *Hepner v. United States*, 213 U. S. 103, 111, in this language—

In the latter case (*Boyd v. U. S.*) it was adjudged that penalties and forfeitures incurred by the conviction of offenders against the law are of such a quasi-criminal nature that they come within the reason of criminal proceedings for the purpose of the fourth amendment of the Constitution and of that part of the fifth amendment declaring that no person shall be compelled in any criminal case to be a witness against himself.

Some light is thrown upon the subject by what is said in *Smith v. Maryland*, 18 Howard 71, 76. In that case the question was whether a law of Maryland, enacted for the protection of oysters in waters covering lands in the State afforded valid cause for seizing a licensed and enrolled vessel of the United States and interrupting its voyage, and pronouncing for its forfeiture. As bearing upon the subject under discussion Mr. Justice Curtis said—

That objection that the law in question contains no provision for an oath on which to found the warrant of arrest of the vessel, cannot be here maintained. So far as it rests on the constitution of the State, the objection is not examinable here, under the twenty-fifth section of the judiciary act. If rested on that clause in the Constitution of the United States which prohibits the issuing of a warrant but on probable cause supported by oath, the answer is, that this restrains the issue of warrants only under the laws of the United States, and has no application to State process.

See also what is said by Mr. Justice Curtis in *Murray's Lessee v. Hoboken, etc., Co.*, 18 Howard 227, bottom page 285, and see the opinion of Attorney General Nelson (1843).

The protection guaranteed is not against all seizures, it is against unreasonable seizures, can be made only upon reasonable cause; and, when authorized, the evidence of its reasonableness is to be presented by oath or affirmation. (4 Op. Atty. Gen. 213.)

The question in every case of seizure is, whether the seizure was justified or not, and the proceeding to ascertain that fact is a civil proceeding, but a seizure of goods is in effect a proceeding against the owner. *Boyd v. United States*, 116 U. S. 637; *The City of Norwich*, 118 U. S. 468, 504—and hence criminal in nature, and the matter is brought within the meaning and operation of the fourth amendment under which it is a no less serious offense to seize goods than it is to seize the person without a warrant under oath founded upon probable cause.

Power is given Congress by the Constitution to regulate commerce and to pass all laws necessary and proper to carry that power into effect. The Food and Drugs Act is sanctioned by that power. But in carrying out that power regard must be had to other provisions of the Constitution, and if a seizure of goods is necessary it can only be made in the way prescribed by the fourth amendment. See remarks of Judge Drummond in *Mason v. Robbins*, 9252 Fed. Cases.

In all criminal cases in which a warrant is issued for arrest, probable cause must be shown by the affidavit of some one who has knowledge of the facts. This may be [9] regarded as settled. The rule is laid down by Justice Bradley on the Circuit, in the *Rule of Court*, No. 12126 Fed. Cases. He says—

No warrant shall be issued by any commissioner of this court for the seizure or arrest of any person charged with a crime or offense against the laws of the United States upon mere belief or suspicion of the person making such charge; but only upon probable cause, supported by oath or affirmation of such person, in which shall be stated the facts within his own knowledge constituting the grounds for such belief or suspicion.

See also *United States v. Tureaud*, 20 Fed. 621, 623; *United States v. Polite*, 35 Fed. 59; *Erwin v. United States*, 37 Fed. 470, 489; *In re Gourdin*, 45 Fed. 842, 843; *In re Dana*, 68 Fed. 895; *Johnson v. United States*, 87 Fed. 187.

Historically, arbitrary seizure is one of the great grievances against despotic power. In these days the reasons for the protection of persons and property, and the fact that they are protected, are almost forgotten in the paucity of attacks upon them, yet, how that protection was wrung from reluctant tyranny must always be borne in mind and no act can be sanctioned which would tend to weaken the great safeguard of our liberties and permit at sometime encroachments thereon which might seem justified by authority of law or by judicial interpretation. *Boyd v. United States*, 116 U. S. 616, 635. In many cases of seizure discussed in this opinion

the fact does not appear whether a warrant was issued prior to the seizure, nor was the form of the warrant disclosed, but in the opinion of this court, considering the seriousness of governmental seizures of the private property of a citizen and the requirements of the fourth amendment, it would seem that the affidavit preceding a warrant in proceedings in their nature criminal for the seizure of goods should be made by some one cognizant of the facts, then upon the issuing of the warrant and the seizure of the goods, the district attorney may proceed "to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States without delay for the enforcement of the penalties," as provided by the act.

It is argued by the district attorney that—

even the Constitution must be reasonably construed, and it was never intended or decided that the court should examine a case in advance of issuing process for seizure for condemnation, and should afterwards have to try the case on the same evidence to determine whether the case was actually made out.

In answer to this it may be said that the proceedings resulting in the issuing of the warrant are altogether *ex parte*. There is no trial. There is an affidavit presented by some one who claims to be conversant with the facts, setting forth facts which would show probable cause.

The demurrer on its second ground is well taken.

3. "It does not appear in and from the averments contained in said libel that the goods therein mentioned are still subject to the provisions of the act of Congress of June 30, 1906, in said libel invoked."

From sections 2 and 10, it may be gathered that the offense charged is the shipping of the contraband article from one State into another, or, having received it, to deliver or offer to deliver the unbroken packages for pay or otherwise, and that a seizure and forfeiture may be had, first, when the article is being transported from one State to another for sale, and, second, having been so transported remains unloaded, unsold, or in the original unbroken packages.

It may well be that the Prescription Products Company was the owner of these unbroken packages or had them in its possession for the purpose of being used, manufactured, sold, and consumed as drugs without the packages having been transported for sale or received for sale. Of course if the original packages were to be used and manufactured Congress had no power to legislate respecting them, and if they were to be sold after manufacture then the original packages must necessarily have been broken, and then the law would have to look to the labels on the original packages [10] into which the manufactured product had been put, and only then if it were shipped from Dayton into some other State.

If the words "used and manufactured" are rejected as surplusage and the illegal conduct is restrained to the words "sold and consumed as drugs," it may be said that the owner or possessor of these original packages could do as he pleases with them if they were not transported into the State to be sold in the original packages. They may have been, as they probably were, transported to be manufactured as in the *United States v. 65 Casks Liquid Extracts*, 170 Fed. 449, 456, and then when the manufactured product is sold

it must bear the proper label, if labeled at all. These casks may have been transported for purposes of experiment and, not being used for such purposes, were sold by the person receiving them to the present owner or possessor. So far as it appears by the label, years may have elapsed since the transportation for some other purpose than for sale in the original packages, and it may be that during all that time State taxes have been paid by the owner or possessor. Indeed the packages may have been in the ownership and possession of the claimant before the food act was passed, and if so, could not come within its operation, article 1, section 9, clause 3, Constitution of the United States. The court is of opinion that no forfeiture can be declared under the libel as drawn, and the third ground of demurrer will be sustained.

4. "Said libellant has not in and by its said libel made or stated such a case as entitles the said libellant to the relief therein prayed, inasmuch as the said act of June 30, 1906, has no application to shipments of the character of the said shipments, set forth in said libel."

Under the provisions of section 8, the term "misbranded" applies to drugs, "the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular," or (sub-second) "if the packages fail to bear a statement on the label of the quantity or proportion of any alcohol * * *."

The legend, "Prescription Products Company, Dayton, Ohio, S. 59884, P. D. Co. No. (1)" is not intelligible. It may be a shipping direction or it may have been put on the packages by the claimant for purely innocent purposes of its own. As it reads it cannot be said to be a statement, etc., of the article in the casks or of the ingredients and substances contained in them. It may be that apt words by way of inducement or inuendo would bring the legend within the language of the law and show that it was a statement, etc., false or misleading in some particular. It may be that when interpreted it would show a full compliance with the law.

The law does not require any label except by inference, and by no means necessary inference. A man cannot be convicted of a criminal offence or his property forfeited by inference. The effect of the provision of the law is that no original packages of drugs shall be introduced into one State from another for purposes of sale in the original packages the label of which is misleading or false. If there is no label there is no misrepresentation. If the label is unintelligible it is no description of the contents of the package and can deceive nobody.

But it would be a too great refinement of language to say that these marks are not labels. The casks certainly are labeled as described. It may be that the marks when interpreted would show the required content of alcohol, but the label should make that fact intelligible. Since the casks are labeled, the required information should appear clearly on the label, whether it is a separate paper pasted on the cask or branded upon it.

Inasmuch, however, as the libel does not charge that the packages were transported into the State for sale, this ground also for the demurrer must be sustained.

Order accordingly.

NAVE-McCORD MERCANTILE CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit, September 19, 1910.)

182 Fed. 46; N. J. No. 895.

Averments in an information that a fluid, labeled "Flavor of Lemon and Citral—A Pure Flavor," was misbranded in that it did not contain an appreciable quantity of lemon oil, which is an essential ingredient of a pure lemon flavor, *held* not to state facts sufficient to show misbranding.

Error to the District Court of the United States for the Western District of Missouri.

The Nave-McCord Mercantile Company was convicted of a violation of section 2 of the Food and Drugs Act, and brings error. Reversed and remanded.

Before SANBORN and ADAMS, Circuit Judges, and REED, District Judge.

SANBORN, *Circuit Judge*. The Nave-McCord Mercantile Company, a manufacturing corporation, challenges its conviction of a violation of Act June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1187), for the prevention of the manufacture, sale, or transportation of adulterated, or misbranded, or poisonous, or deleterious foods, drugs, medicines, and liquors, and assigns as error that the court below overruled its demurrer to the information under which it was convicted. That information consisted of three counts. The first count charged that the company misbranded a fluid it made and sold by labelling it "Flavor of Lemon and Citral—A Pure Flavor," [47]¹ when in fact this fluid "did not then and there contain any measurable and appreciable quantity of lemon oil, which said lemon oil in measurable and appreciable quantity is a necessary and essential ingredient of a pure lemon flavor." But the fluid was not marked or labeled a pure lemon flavor, and the count contained no averment that lemon oil in measurable quantities was an essential ingredient of a pure flavor of lemon and citral, and hence it charged no offense.

The second count charged a misbranding of the same fluid, which the pleading declared "was a fluid substance purporting and represented to be lemon and citral flavor," in that the company labeled it "A Pure Flavor," "which said marking and labeling" the information avers, "was intended to convey to the purchasing public the meaning that said article of food was a pure flavor or extract derived from the lemon fruit, containing, among other things, the oil of lemon and citral derived from such fruit, when in truth and in fact said article of food contained no pure lemon flavor, in that it contained no measurable amount of lemon oil, and did contain an added substance not derived from the lemon fruit, to-wit, citral, and when in truth and in fact pure fruit flavors are derived either from the fruit directly or by the solution of the essential oil of the fruit through the medium of alcohol." But the fluid according to this count was represented to be a lemon and citral flavor, and was branded a pure flavor. The plain and incontrovertible meaning of such a brand was, not that the fluid was a pure flavor of lemon, but that it was a pure

¹ Numbers in brackets refer to pages of Federal Reporter.

flavor of lemon and citral; and the averment that the company intended that the purchasing public should interpret the label to mean that which it clearly did not indicate, and which the information does not aver that any purchaser ever understood it to mean, could not constitute a misbranding. In reality this charge is that the fluid contained no pure lemon flavor, but contained an added substance not derived from the lemon fruit, to-wit, citral, and that it was branded a pure flavor of lemon and citral. This was a true and not a false branding. If the company had branded the fluid a pure flavor of lemon, it might have violated the law, because it also had the flavor of citral, and if the pleader had averred that the oil of lemon in appreciable quantities was an essential ingredient of a pure flavor of lemon and citral and that this fluid contained none of it the count might have stated an offense. But no such averment was made, and the second count failed to state facts sufficient to constitute a violation of the law.

The third count of the information charged that the company adulterated and misbranded this fluid, which purported and was represented to be lemon and citral flavor, by marking and labeling it "Flavor of Lemon and Citral—A Pure Flavor," by which statements the count declares the company "designed and intended the public to understand and believe that said food product was a pure flavor and extract of lemon," when these marks and labels "were false and misleading in this: That said article, so manufactured, prepared, and shipped, * * * was an imitation of the true lemon flavor, commonly called "lemon extract," so commonly used and employed in the preparation of food products, and of far less value, strength, and [48] efficacy than said true lemon flavor." But an innuendo may not change, add to, or enlarge the sense of expressions beyond their usual acceptation and meaning. It may serve as an explanation, but not as a substitute. Wharton's Criminal Pleading and Practice, 9th Ed., Sec. 181a, and cases there cited. The usual acceptation and meaning of the label "Flavor of Lemon and Citral—A Pure Flavor" distinctly negatives the idea that it describes a pure flavor and extract of lemon, and the expression "a pure flavor and extract of lemon" cannot be substituted by pleading or proof for that which the defendant actually used, and then the defendant be convicted upon the substituted label, which it never conceived. Nor may an averment that a defendant intended that a label should be understood by the public to mean the opposite of its ordinary and accepted interpretation make its use a misbranding or constitute a violation of the law. The truth is that, when the averments of this count are read and construed together, they clearly disclose the facts that the fluid made and sold by the defendant was not a pure lemon extract or a pure lemon flavor, or any imitation thereof; that the defendant never placed any label or mark upon it which indicated that it was, or which could mislead a purchaser, but that by its declaration through the label that it was a flavor of lemon and citral it clearly notified all purchasers that the fluid was neither a pure lemon extract nor a pure lemon flavor. There is no averment of any facts which disclose any adulteration of this flavor of lemon and citral, and the averment fails to state sufficient facts to constitute a violation of the law. *United States v. Hess*, 124 U. S. 483, 486, 487, 8 Sup. Ct. 571, 31 L. Ed. 516; *United States v. Post* (D. C.) 113 Fed. 852. The de-

murrer to the information should have been sustained, and, as this conclusion disposes of the case, it is unnecessary to consider other alleged errors, and the judgment below is reversed, and the case is remanded to the district court, with instructions to discharge the defendant below.

UNITED STATES v. FIVE BOXES OF ASAFÆTIDA.

(District Court, E. D. Pennsylvania, September 19, 1910.)

181 Fed. 561; Circular No. 41, Office of Solicitor.

Held, that a drug is not subject to seizure for condemnation and forfeiture under section 10 of the Food and Drugs Act, unless it is adulterated or misbranded at the time of seizure.

Libel under section 10 of the Food and Drugs Act. On libel and answer. Libel dismissed.

[562]¹ *HOLLAND, District Judge.* This libel is filed by the Government under the provisions of the act of June 30, 1906, for the purpose of effecting the condemnation of five boxes of asafætida, which it is alleged were adulterated within the meaning of this act of Congress. An attachment was issued and the drug seized by the Government, after which a claim was made by Smith, Kline & French Company, in whose possession the asafætida was found, and an answer duly filed by them, in which the claimants urge that the libel be dismissed and that the drug seized under the attachment be returned to them.

From the libel and answer, upon which the case was argued, we gather the following undisputed material facts:

On the third day of May, 1910, T. M. Curtius, of the city of New York and State of New York, shipped via Clyde Steamship Company, a common carrier, five boxes of asafætida to Smith, Kline & French Company, of the city of Philadelphia, in the State of Pennsylvania, for which, at the time, the latter paid Curtius in full and received the asafætida in their possession, at their place of business, No. 429 Arch Street, in this city. "Being a drug sold under a recognized name in the United States Pharmacopœia," it was adulterated within the meaning of the act of Congress at the time of transportation, in that it differed from the strength, quality, and purity as determined in the test laid down in the United States Pharmacopœia official at the time of the investigation, in this: That the standard of strength, quality, and purity determined by the test required that not less than 50 per cent of the asafætida should dissolve in alcohol, and, when incinerated, the said alcohol should yield not more than 15 per cent of ash; whereas, less than 50 per cent of the asafætida contained in these five boxes was soluble in alcohol, and when incinerated yielded more than 15 per cent of ash.

The claimants, immediately after the receipt of this asafætida and before the service of the attachment, opened the packages and took therefrom sufficient for the purpose of examination, and caused the standard of strength, quality, and purity to be plainly stamped upon the containers, as required by the seventh section of the pure food

¹ Numbers in brackets refer to pages of Federal Reporter.

act, and all the containers were so marked at the time of the service of the attachment. Smith, Kline & French Company, in whose possession the drug was found, were the owners thereof, having paid the full purchase price before the service of the attachment; but after its receipt they had never delivered it in original unbroken packages for pay, or otherwise, or offered to deliver it to any other person before the containers were duly marked as required by the act.

Upon these facts the claimants urge that the libel should be dismissed, for the reasons: (1) that no forfeiture could be had under section 10 because under section 2 the facts in this case would not support a criminal prosecution against the claimants; (2) that the taking of samples operated to remove the merchandise from the provision of the act as "original packages;" and (3) that the proper labeling of the packages before seizure relieved them from liability to forfeiture under the terms of section 10.

The provisions of the act upon which the Government relies to enforce its claim for forfeiture of this merchandise, upon the facts as above stated, are as follows:

In section 2 it is provided that the introduction into any State from any other State of any article of drug which is adulterated or misbranded within the meaning of this act is hereby prohibited, and any person who shall ship or deliver for shipment from any State to any [564] other State, or shall receive in any State from any other State, and, having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of the act, shall be guilty of a misdemeanor.

Section 7 provides:

First. If, when a drug is sold under or by a name recognized in the United States Pharmacopœia or National Formulary, it differs from the standard of strength, quality, or purity, as determined by the test laid down in the United States Pharmacopœia or National Formulary official at the time of investigation: Provided, That no drug defined in the United States Pharmacopœia or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality, or purity be plainly stated upon the bottle, box, or other container thereof although the standard may differ from that determined by the test laid down in the United States Pharmacopœia or National Formulary.

And section 10 provides that any article of drug that is adulterated or misbranded within the meaning of this act, and is being transported from one State to another for sale, or, having been transported, remains unloaded, unsold, or in original or unbroken packages, shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation.

It is obvious that the claimants could not be convicted of a misdemeanor, as section 2 requires not only that they should have received the adulterated or misbranded drugs from another State, which they have done in this case, but the section further requires that, after having so received it, they deliver it in unbroken packages, for pay or otherwise, or offer to deliver it to another person so adulterated or misbranded within the meaning of the act, which they have not done. They have received it from another State, but they neither delivered nor offered to deliver it, for pay or otherwise, in the unbroken packages.

It is urged that, by reason of the fact that a criminal prosecution could not be sustained against them, no forfeiture can be had under section 10. We do not consider this contention sound, because section 2 and section 10 are not at all interdependent. The misdemeanor denounced in section 2 is entirely distinct and independent of the grounds of forfeiture in section 10. Congress has clearly defined in section 2 what acts or omissions shall constitute a misdemeanor with regard to adulterated or misbranded articles of food or drug, and, in order to ascertain whether or not any person is guilty of having violated the provisions of this section, it is not at all necessary to refer to section 10, as section 2, as to what shall be deemed a misdemeanor, is complete within itself.

As to adulterated articles, it is a misdemeanor (1) to ship from one State to another; (2) to receive and deliver, or offer to deliver the same for pay, in unbroken packages. Such articles are liable to seizure and forfeiture under section 10 (1) when in the course of being transported from State to State; (2) when, having been transported, they remain (a) unloaded, or (b) unsold, or (c) in the original packages.

It will be seen that section 10 fully and completely defines the conditions under which such articles are liable to seizure and forfeiture. [565.] There is no reference to or dependence upon the misdemeanor defined in section 2, and it is unimportant, as far as the forfeiture proceedings are concerned, whether or not any person could be convicted under section 2. Congress has defined fully in section 10 when and under what circumstances the article of food or drug shall be forfeited without reference to the guilt of the owner under section 2. Under the common law, the offender's right was not divested upon forfeiture proceedings until conviction, but this doctrine never was applied to seizures and forfeitures created by statute in rem for violations of the revenue law of the Government. The thing there is primarily considered the offender, or rather, the offence was attached primarily to the thing, and this whether the offence was *malum prohibitum* or *malum in se*. It therefore follows that when the thing is inculpatated under an in rem statutory provision it may be forfeited, although the act which caused the forfeiture was not authorized or done by or with the consent or knowledge of the owner. *Dobbins v. United States*, 96 U. S. 395, 24 L. Ed. 637, 19 Cyc. 1357.

The purpose of this act is to conserve the public health by preventing interstate commerce in poisonous or deleterious foods and drugs, and, in order that this may be effected, it is not only made a misdemeanor under the act, but the article of food or drug adulterated or misbranded is declared to be forfeited as an offending thing which threatens the health of the citizen and therefore subject to seizure without regard to the acts or knowledge of the owners or claimants.

Neither do we think that the taking of samples operated to remove the merchandise from the provision of the statute as original packages. There is no exact and comprehensive definition of the term, "original package." The cases heretofore considered involving this question have been disposed of by the application not of a precise definition, but of certain broad general principles to the precise and particular facts.

An extract from the opinion of the Supreme Court in *Brown v. Maryland*, 25 U. S. 419, 6 L. Ed. 678, is probably the nearest guide we may have as to what may be considered an original package. "It is sufficient for the present to say, generally, that, when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State."

In the case at bar, the claimants, upon receipt of these packages of asafœtida, merely took samples therefrom for the purpose of examination, and in order that they might comply with the provisions of the act in regard to causing the standard of strength, quality, and purity to be plainly stamped upon the containers. This could not be considered to have destroyed the commercial form, and obviously did not operate to "incorporate" the same with the general property of this State.

A substantially similar question was presented to the Supreme Court of Iowa in 1895, in the case of *Wind v. Iler & Co.*, 93 Iowa 316, 61 N. W. 1001, 27 L. R. A. 219, in which case the bungs in certain barrels of liquor were drawn for the purpose of testing the contents [566] before accepting the same by the purchaser, and the question was whether it was still to be regarded as interstate commerce. Upon this point the court said:

The question yet remains, did the drawing of the bung in the barrels in which the liquors were shipped into the State have the effect claimed for it by the appellant? We think not. The barrel was opened in order that a small quantity might be taken from it and tested—not used—in order to determine whether the liquors would be returned or not. We do not think that the inspecting or testing of an imported article to determine whether it shall be returned has the effect to make it a part of the general mass of property in the State.

This conclusion is supported by the decision in two well considered Federal cases.

The first case, (*United States v. Fox*, Fed. Cas. No. 15,155), decided in 1869, was a suit by the United States under the internal revenue act of July 13, 1866 (14 Stat. 144), to recover the penalties therein prescribed for the sale of perfumery without affixing a proper stamp thereon. A proviso in the act prescribed that, when imported perfumery was sold in the original and unbroken package in which the bottle or other inclosure was packed by the manufacturer, the person so selling should not be liable to the aforesaid penalty.

Fox sold one small wooden box containing twelve 1½ ounce bottles of hair oil and a similar but larger box containing twelve bottles of pomade. He opened both boxes, so that the purchaser might examine the contents. The top of the smaller box was put on again before delivery without change of the contents. In the larger box, containing the pomade, Fox, at the request of the purchaser, substituted three smaller bottles taken from the shelf of the store, and nailed up the box.

In respect to the smaller box of oil the court said:

Although the top of this box was taken off by the defendant, Fox, it was only for the purpose of enabling the witness Quivey to ascertain the kind and quality of its contents, and before the sale and delivery to him it was put on again,

with the contents unchanged in kind or quantity. Under these circumstances the defendant must be considered as selling an unbroken package, the contents of which were not then required to be stamped.

But as to the sale of the box of pomade the court said:

The package was opened, and, three bottles being taken out of it, it was sold with only the remaining nine bottles in it. This was a broken package, and so the court instructed the jury.

The verdict of the jury in favor of the defendant, Fox, was set aside on motion of the United States, upon the ground that the package of pomade was not an original package; the court holding:

Goods are sold "in original and unbroken package" within the meaning of the act of July 13, 1866 (14 Stat. 144), although the package is opened for inspection, if closed again before delivery without the contents being changed.

In the other case (*In re McAllister* [C. C.] 51 Fed. 282, decided in 1892), the facts were these: Two men, emissaries of a butter dealer in Baltimore, went to the store of McAllister, a dealer in oleomargarine, and sought to buy butter. McAllister stated that he had none, but could supply oleomargarine. They requested him to remove the [567] lid from the tub of oleomargarine that they might look at it. He did so, stating that he could not sell less than ten pounds, as it reached him in the tub from Chicago. They purchased the tub and forthwith informed on him. He was duly tried in the State court and convicted. The State Court of Appeals affirmed the conviction, and McAllister applied to the Circuit Court of the United States for a writ of habeas corpus, on the ground that the sale of the tub of oleomargarine was a sale of an original package and beyond the power of the State to prohibit, which it sought to do in the act of the legislature. The court granted the writ and announced the proposition of law involved, in the following syllabus to the case:

Removing the lid of an original package of oleomargarine, so that a prospective buyer may examine its contents, is not such a breaking of the package as will destroy its original character.

In reaching the above conclusion the court said:

It is argued that the taking the lid from the tub containing this oleomargarine was a breaking of the package so as to destroy its original character. This in no sense did it do. The goods had in no way become commingled with his property or the general property of the State (*Low v. Austin*, 13 Wall., 29, 20 L. Ed. 517). Any one calling for oleomargarine with an honest purpose would have purchased this package as an original one, even if he knew it had had its lid lifted off once to see whether or not it held another substance than it purported to hold. The laws of the United States recognize oleomargarine as a merchantable article. Being such, while a State may perhaps regulate its sale, it cannot prohibit its importation. The statute in question does this, and is unconstitutional, and in this respect void. The petitioner is discharged.

In the light of the foregoing adjudications, it cannot be held that the mere taking of a sample from the original package for the purpose of examination and for the purpose of complying with the act to plainly state upon the container the standard of strength, quality, and purity of the drug was a breaking up of the original package and operated to incorporate the same in the general property of the State. The original character of the package was not, for the reasons stated by the claimants, destroyed.

The third defence interposed by the claimants, that the proper labeling of the packages before seizure relieved them from liability

to forfeiture under the terms of section 10, must be regarded as more substantial and as a good ground for dismissing the libel. Under this in rem statutory forfeiture procedure of section 10, the article of drug itself is the thing inculpated, and it must be adulterated or misbranded within the meaning of the act at the time the Government seizes it. It was not adulterated when seized, but branded as required by law. It is not sufficient that it was adulterated when it was being transported from one State to another and liable to forfeiture at that time. It was not then seized, and there is no language of the act to authorize seizure for any past offending condition of the drug. A drug that "is" adulterated or misbranded (is the language used) and "is" being transported from one State to another for sale, shall be liable, etc. A drug, which, "having been transported, remains unloaded, unsold, or in original unbroken packages," shall it be liable to forfeiture for some previous irregularity, if not adulterated or misbranded at the time of [568] seizure? It is not so stated in the act. There is no seizure of a drug that "was" adulterated authorized. Having been transported and remaining unloaded, unsold, or in the original unbroken packages, it can only be forfeited when it "is" adulterated and misbranded when seized.

These boxes of asafœtida when seized by the Government were not adulterated within the meaning of the act. It is true they "had been transported" (from one State to another for sale) and "remained in the original unbroken packages at the time the Government seized them;" but they were not adulterated.

Under section 7 this asafœtida was adulterated only in case its standard of strength, quality, and purity was not plainly stamped upon the containers, but if so marked it was not adulterated. The liability to forfeiture of the drug, therefore, would depend upon whether or not the containers were so marked at the time the Government seized them. They were so marked and not liable to seizure.

The containers having been branded according to the requirements of the act at the time of seizure, there is no valid ground for forfeiture, and the libel in this case is dismissed, and the Government is directed to return to the claimants the five boxes of asafœtida seized under the attachment.

UNITED STATES v. NINE BOXES OF ASAFÆTIDA.

(District Court, E. D. Pennsylvania, September 19, 1910.)

181 Fed. 568.

United States v. Five Boxes of Asafœtida, p. 318, *ante*, followed.

Libel under section 10 of the Food and Drugs Act. Libel dismissed.

HOLLAND, District Judge. The facts in this case are substantially the same as those upon which the case of *United States of America v. Five Boxes of Asafœtida* (No. 7 of 1910), 181 Fed. 561, was determined.

For the reasons stated in the opinion filed in that case, the libel in this case is dismissed, and the Government is directed to return to the claimants the nine boxes of asafœtida seized under the attachment.

UNITED STATES v. PSAKI ET AL.

(Circuit Court, S. D. New York, September 27, 1910.)

181 Fed. 635.

Held that there is no breach of a bond given by an importer under section 11 of the act unless 10 days elapse without compliance being had with a demand for the return of the goods released under said bond.

Action by the United States against Nicholas Psaki and others. On demurrer to complaint. Sustained.

LACOMBE, *Circuit Judge*. The action is upon a bond given upon importation of certain merchandise. Some of the packages were sent to the public store to be opened and examined; the remaining packages were delivered to the importers upon their giving the bond in question. Its condition is that the obligors "shall, within 10 days after the package or packages designated by the collector and sent to the public store to be opened and examined have been appraised and reported to him, be returned upon demand to the order of the collector without having been opened." The complaint avers that defendants did not return upon demand, etc., but is silent as to whether or not the demand was made within the 10 days.

There is no breach of the bond unless the 10 days elapse without compliance being had with a demand for a return. Failure to demand within the 10 days is not a defense, as was suggested on the argument; demand and disobedience thereof must be shown to establish a breach. If the pleader had set forth the facts, viz, that the goods were appraised and reported on such a date, that demand was made on such a date, and that such demand had not been complied with, he would have stated his case with a specifness which it now lacks.

The demurrer is sustained, with leave to amend the complaint within 10 days.

UNITED STATES v. 46 PACKAGES AND BAGS OF SUGAR.

(District Court, S. D. Ohio, W. D., October 8, 1910.)

183 Fed. 642; N. J. No. 723.

A libel filed under section 10 of the Food and Drugs Act, for the condemnation and forfeiture of an article of food, *held* fatally defective for failure to allege that the article had been shipped *for sale*.¹

Libel under section 10 of the Food and Drugs Act. On exception and demurrer to the libel. Sustained.

[643]² SATER, *District Judge*. The libel is filed under section 10 of the Pure Food and Drugs Act (Act June 30, 1906, c. 3915, 34 Stat. 771 [U. S. Comp. St. Supp. 1909, p. 1193]). By that section it is enacted that "any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act, and is be-

¹ Contra, *Hipolite Egg Co. v. United States*, p. 378, *post*.

² Numbers in brackets refer to pages of Federal Reporter.

ing transported from one State, Territory, District, or insular possession to another for sale, * * * shall be liable to be proceeded against in any district court of the United States within the Territory where the same is found, and seized for confiscation by a process of libel for condemnation." The case does not fall within that provision of the law because the goods were not seized while in transportation. The section also provides in the alternative that: "any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act * * * having been transported, remains unloaded, unsold, or in original unbroken packages, * * * shall be liable to be proceeded against [in like manner]." "Having been transported" from where to where? Clearly not from one point in a given State, Territory, District, or insular possession to another point in the same State, Territory, District, or insular possession, because in that case the article has not passed into interstate commerce. The words, "having been transported," etc., are connected by the disjunctive "or" with the preceding portion of the section. Following the words "having been transported" is an ellipsis, an omission of words necessary to the complete construction of the sentence. Those words are found in the preceding part of the section and, when supplied, the clause under which this libel is filed reads and means, "any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act, having been transported from one State, Territory, District, or insular possession to another for sale, remains unloaded, unsold, or in original unbroken packages, * * * shall be liable," etc. [644] This construction of the section is not only rational and in accordance with the maxim *noscitur a sociis*, but is necessary to make the clause applicable to articles which have entered into interstate commerce. The words "is being transported," and "having been transported," are coupled together by the word "or" and are both limited by the same qualifying terms. The view above expressed is in accordance with the ruling in *United States v. 65 Casks of Liquid Extracts* (D. C.) 170 Fed. 449, affirmed in 175 Fed. 1022, 99 C. C. A. 667. The libel does not show that the articles seized were transported for sale. It does not show whether the articles were shipped by some one in Illinois to himself at Cincinnati, or to some other person, or how or from whom the Gerke Brewing Company obtained possession or acquired ownership, if such it has.

There is an averment in the third paragraph of the libel that the packages are "owned by or in the possession of said Gerke Brewing Company, doing business as aforesaid, for the purpose of being used and manufactured, sold and consumed as food." The closing language of the quoted passage is somewhat ambiguous, but giving it the construction most favorable to the Government—that the brewing company's purpose is to sell it for consumption as food—I do not see how the otherwise defective nature of the libel is helped out.

In view of the conclusions above reached, it is perhaps unnecessary to rule on the contention that there should be a specific averment that the percentage of ash is greater than that found in standard climax sugar, or as to whether or not the court must take notice of the standard fixed by the circular issued by the Secretary of Agriculture. The fact that there is a doubt as to the court's duty in that respect will suggest an averment in future libels that will obviate the

objection urged. The exceptions and demurrer are sustained. Exceptions may be noted.

The district attorney disputes the right of the Corn Products Refining Company to interplead or file a brief in the case unless further evidence is offered that it is a party in interest or that it is the bona fide owner of the packages of sugar which have been seized. As Judge Thompson permitted the company to answer, and subsequently another order was granted permitting the answer to be withdrawn and the exceptions and demurrer to be filed, to which latter the district attorney assented, the objection comes too late.

The exceptions and demurrer are ruled on to the extent above named. Several of them were waived by the defendant.

UNITED STATES v. J. LINDSAY WELLS CO.

(District Court, W. D. Tennessee, October 22, 1910.)

186 Fed. 248; N. J. No. 794.

Held, that since a violation of section 2 of the Food and Drugs Act is not an infamous crime, the proceeding for such violation may be by way of information, and need not be by indictment.

Information charging violation of section 2 of the Food and Drugs Act. On motion to quash. Denied. Plea of guilty.

STATEMENT OF FACTS.

On or about March 23, 1909, the J. Lindsay Wells Company, a corporation of Memphis, Tenn., shipped from the State of Tennessee into the State of Indiana a consignment of cotton seed meal. Samples from this shipment were procured and examined by the Bureau of Chemistry, United States Department of Agriculture, and the product was found to be a mixture of cotton seed meal and cotton seed hulls. As it appeared from the above examination and report thereon that the product was adulterated and misbranded, within the meaning of the Food and Drugs Act of June 30, 1906, the Secretary of Agriculture afforded the said J. Lindsay Wells Company, Incorporated, and the party from whom the samples were procured, opportunities for hearings. As it appeared after hearings held that the shipment was made in violation of the act, the Secretary of Agriculture reported the facts to the Attorney General, with a statement of the evidence upon which to base a prosecution.

In due course a criminal information was filed in the District Court of the United States for the Western District of Tennessee against the said J. Lindsay Wells Company, Incorporated, charging the above shipment, and alleging that the product so shipped was adulterated, in that a substance, [249]¹ to wit, cotton seed hulls, had been mixed and packed with the said cotton seed meal, so as to reduce, lower, and injuriously affect its quality, and in that said cotton seed hulls had been substituted in part for the said cotton seed meal. The information also alleged that the product so shipped was misbranded, in that said article was offered for sale and sold upon

¹ Numbers in brackets refer to pages of Federal Reporter.

the representation that the same was choice cotton seed meal, thereby causing the purchaser to believe the same to be pure cotton seed meal, whereas in truth and in fact the same was a mixture of cotton seed meal and cotton seed hulls, and that the statement that said article was cotton seed meal was false and untrue.

Whereupon the said J. Lindsay Wells Company, Incorporated, moved to quash the above information upon the ground that the same violated that part of the fifth amendment of the Constitution of the United States which provides that no person shall be held to answer for a capital or otherwise infamous crime, unless upon presentment or indictment of a grand jury.

McCALL, District Judge. This is an action brought by the United States against J. Lindsay Wells Company under section 2 of the act of June 30, 1906, on the charge of shipping from Memphis, in the State of Tennessee, to Attica, in the State of Indiana, thirty tons of cotton seed meal, which article of food at Memphis, Tenn., was adulterated.

The suit is brought upon information made by the United States district attorney.

The defendants move to quash the information, upon the ground that the same violates that part of the fifth amendment of the Constitution of the United States, which provides that no person shall be held to answer for a capital or otherwise infamous crime, unless upon presentment or indictment of a grand jury.

The question presented is whether or not the offense alleged to have been committed by the defendant is a capital or otherwise infamous crime?

It is, of course, not a capital crime, and, if it is otherwise an infamous crime, the motion to quash must be allowed, since, under the authorities, it is well settled, that a prosecution can be maintained upon information made by the district attorney for such a crime. *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89.

As I [250] understand the authorities, they hold that any offense, the punishment for which may be imprisonment in the penitentiary, with or without hard labor, is an infamous crime. *Mackin v. United States*, 117 U. S. 348, 6 Sup. Ct. 777, 29 L. Ed. 909; *Parkinson v. United States*, 121 U. S. 281, 7 Sup. Ct. 896, 30 L. Ed. 959; *In re Claasen*, 140 U. S. 204, 11 Sup. Ct. 735, 35 L. Ed. 409.

On an examination of the act under which this suit is instituted, I find that the punishment therefor is a fine not exceeding two hundred dollars for the first offense, and, upon conviction for each subsequent offense, not exceeding three hundred dollars, or by imprisonment not exceeding one year, or both, in the discretion of the court.

Under the authorities above cited, it is held that a defendant can not be imprisoned in the penitentiary, unless the time for which he is sentenced shall be more than one year. Under the act of June 30, 1906, the imprisonment can not exceed one year. Therefore the court has no power to sentence the defendant to imprisonment to the penitentiary, because that would be in excess of the maximum time which the court is authorized to imprison a party for such offense.

As I understand the authorities, they hold in substance that, where the court may imprison the accused for more than one year, the

confinement must be in the penitentiary, and that fact, with or without labor, makes the offense for the commission of which the accused is imprisoned an infamous crime. Upon the other hand, where the period of imprisonment is for one year or less, the court must imprison in a county jail, and in such case the crime is not infamous.

If the court may imprison for more than one year, the crime is infamous. If for a year or less, it is not infamous.

Under section 1022 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 720), it is provided that all crimes and offenses committed against the provisions of Ch. 7, entitled "Crimes," which are not infamous, may be prosecuted either by indictment or by information filed by the district attorney.

It appearing from the foregoing that the crime for which the defendant is charged is not infamous, I am of the opinion that this suit can be maintained upon the information filed, and the motion to quash will be disallowed.

UNITED STATES v. HOBART ET AL.

(Circuit Court. S. D. New York, November 15, 1910.)

N. J. No. 846.

An article labeled "Heyer Bros. No. 1 Fancy," sold as molasses, and found on examination to be a mixture of molasses and commercial glucose, *held* misbranded in that it was offered for sale and sold under the distinctive name of another article.

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of "Guilty on both counts without criminal intent." Motion for new trial and in arrest of Judgment. Overruled.

[2] HAZEL, *District Judge* (charge to the jury). The United States attorney has filed an information in this court charging the defendants, a partnership doing business in the city of New York, with committing a misdemeanor, in that they are claimed to have violated the so-called pure food and drug act, which was passed by Congress in June, 1906. The case does not lack in importance, for it is the undoubted duty of the Government and of the officials of the Government to carry a law, solemnly enacted by Congress, into effect, and to bring the offenders of the statute before the bar of justice.

The case is not unimportant from the view point of the defendants. Although the penalty for the first offense may not be regarded as large in comparison, yet it is to be borne in mind that the business rectitude of the defendants is challenged by the information and by evidence in support thereof and which is about to be submitted to you for your determination.

The information contains two counts, and it is for you gentlemen to say whether the Government has established both counts, or either of them, beyond a reasonable doubt, and it is entirely within your province to find the defendants guilty as charged; to find them guilty on one count only, or to find them not guilty.

The information does not charge the defendants with adulterating this product. They are not charged with admixing with molasses the

ingredient commercial glucose, but they are charged with misbranding the merchandise that was sold and delivered to the individuals named in the counts of the information and with selling and delivering to them molasses which in truth and in fact was not such, but which was a compound of molasses and glucose. I think that you should understand the specific charge contained in the indictment, and therefore I quote from it: The defendants are charged "with consigning to Heyer Bros. a certain article of food which was shipped as aforesaid and was misbranded, in that it was in imitation of and offered for sale under the distinctive name of another article, to wit, molasses, whereas in truth and in fact said food shipped as aforesaid was not molasses, but was a compound of molasses and glucose." This specific allegation is also substantially contained in count 2.

The pure food and drug act was passed by Congress to remedy a preexisting evil. It had been called to the attention of Congress that foods sold to the public were adulterated and intermixed with deleterious substances and hence a law was passed forbidding such acts; and hence a law was passed even going further, namely, prohibiting the misbranding of merchandise and prohibiting attaching thereto a mark or indication which held it out to be an article different from what it actually was. The preexisting evil produced by adulterated or misbranded articles of food or drugs, could not be overestimated and hence I again admonish you that the evil that Congress designed to remove, and obliterate and eradicate was an important one and touching the welfare and the comfort of the people.

In this case it is to be established in the first instance that this was an interstate commerce shipment. This court would not have jurisdiction of the offense if it were not an interstate shipment; and the evidence is undisputed in this case that the shipment initiated in the city of New York and that it was delivered in a foreign State, the State of North Carolina; so that you need not take up any time to consider any testimony upon the subject as to whether this [3] was an interstate shipment or not. At the outset of the trial you will remember it was contended that as to the second count the shipment was not interstate, but that question has been waived by the defendant and therefore you may reach the conclusion that the evidence in the case is sufficient to justify your holding that this was an interstate shipment—that both shipments were interstate.

The second element which the Government is required to prove beyond a reasonable doubt is that glucose was in fact introduced into the molasses before or at the time of the shipment, and that the molasses was misbranded in that it was a compound of molasses and glucose.

And the third element is that the defendants, or one of them, or their agent, acting within the scope of his authority, shipped the molasses, in interstate commerce.

That the molasses contained commercial glucose as distinguished from natural glucose is stoutly denied by the defendants and the defendants contend that if you should find that this molasses contained commercial glucose, and if it was admixed with or added to molasses by an agent of the defendants, that such agent was acting without the scope of his authority.

I think before discussing the evidence given on both sides at great length it will not be inappropriate for me to more particularly call

your attention to the act under which this information was filed. The act, defining the word "misbranded" substantially says that the term shall apply to a package or label containing a statement, design or device regarding such article or its ingredients which shall be false or misleading in any particular; and moreover that an article of food or drug shall be deemed to be misbranded when it contains a false label, print or inscription as to the State, Territory or country in which it is manufactured or produced.

The act then specially provides—and this provision more nearly applies to the facts as claimed by the Government in this case—that food is misbranded if it be an imitation of or offered for sale under the distinctive name of another article; or if it be labeled or branded so as to deceive or mislead the purchaser; and when it is a mixture or compound it must be branded by its distinctive name, and it cannot be legally branded as an imitation of some other article and offered for sale.

The pure food and drug act also provides that when articles of food are labeled and marked "compound" or "blend" the term "blend" shall be understood to mean a mixture of like substances, and uses these words in that connection; "not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only."

Of course manufacturers are not obliged to disclose their trade secrets, in the case of proprietary foods which contain no deleterious or harmful ingredients.

The act contains another provision, that after the judgment of the court notice shall be given by publication in such manner as may be prescribed by the rules and regulations referred to in section 3 of the act.

These, in substance, gentlemen, are the same provisions of the act of Congress under which this information was filed. The Government claims that the information is supported by the evidence. It claims that the first shipment occurred on February 28, 1908, and it was from New York City, and then and there consigned to Heyer Brothers and that the consignment was marked "Heyer Bros., No. 1 Fancy." The word "molasses" was not indicated on the consignment, as I remember the testimony, but it is practically conceded on both sides and certainly as I believe it is conceded by the defendant, that it was understood that this indication "No. 1 Fancy" meant No. 1 fancy molasses.

[4] The witness McIntyre, a Government inspector, came to the business place of the consignee sometime thereafter and took from one of the barrels a sample of this molasses which had been delivered by the defendant. He sealed it in a bottle or jar, placing his initials thereupon and forwarded it to the Department of Agriculture where it remained a certain period of time and was then forwarded to the chemist who gave testimony with relation to that count. The chemist, Mr. Seeker, testified that the molasses was contained in a jar or bottle, that it had a seal upon it, to which I have already drawn your attention, and that that seal was intact and the bottle securely closed and the Government actually believes, from that testimony, that the sample had not been disturbed by any one; that the commodity that was analyzed was precisely the commodity that was taken from the barrel by the inspector. Mr. Seeker testified that he

made a chemical analysis of this molasses, that he made two tests, a polariscope test and an erythro dextrine test, and that there was present in the molasses commercial glucose to the extent of 12.8 per cent. He testified that the fact that the molasses for a period of time was kept in a warm climate or in a warm place, or that it contained organic matter, made no difference with the accuracy of his test.

Count 2 relates to a shipment of five barrels of molasses from New York to Newbern, North Carolina, to Armstrong & Co. The witness Mr. Armstrong testified that he ordered molasses and that it came to him in due course of time and was labeled or had a designation upon the barrels of the letters "W. I." and a butterfly; and it is practically conceded that these initials meant or were understood to mean West India Butterfly Molasses. The witness testified that he ordered molasses and not an admixture of the article glucose.

The Government witness Woodman testified that these bottles came to him from the samples that had been collected by the inspector. He also gave testimony that the boxes of jars were accurately sealed and that as a result of the analysis which he made he found the commodity contained commercial glucose amounting to 25 per cent and the balance was molasses. He further testified that natural glucose is different from commercial glucose; and such was also the testimony of the other expert witness who testified with relation to the first count.

Now this testimony, gentlemen, demands your very careful consideration. No witness has been produced by the Government to show that these defendants admixed into this molasses the ingredient glucose. There is no direct evidence tending to show that this offense was committed by the defendant except such as may be ordinarily presumed from the facts and circumstances; but it seems to me, before the testimony of these expert witnesses is set aside as entitled to no weight, before it is discredited, it should receive your careful consideration and should be most carefully scrutinized. In the acceptance of expert testimony or opinion testimony we are often required to accept the testimony of men who are learned in a particular science, or who are skilled in a particular avocation. A physician is called because of his skill and because of his acumen in matters of medical science and surgery and because few of us are doctors or surgeons. A carpenter is called because he may have same peculiar knowledge with relation to building. And so it is with a chemist; a chemist is called to give opinion testimony with a view of disclosing to us the mysteries of chemistry and with a view of stating to us what his opinion may be with reference to a certain state of facts, or with reference to certain researches that he may have made or certain tests that were made by him or in his presence. The credibility of such testimony, however, is entirely for your consideration. You may set it aside as entitled to no weight. But, gentlemen, if you believe from the testimony as it was given in your presence and from the appearances of the witnesses upon the stand, that it was impartially given, that the chemists were disinterested, then I charge you that their evidence is of the greatest value and entitled to the greatest consideration. On the other hand if you believe, as is suggested by the defendant that it was biased, narrow and prejudiced, then manifestly it has little value. The tes-

timony in either event is not conclusive upon you. It is simply given for the purpose of enlightening you as to the true situation.

The defendants have given testimony in their own behalf and they deny mixing molasses with glucose. They deny misbranding; and testimony was given by Mr. Hobart and by Mr. Inslee that the shipment in fact was pure and wholesome; that it was pure molasses and was branded as molasses. Furthermore, they testify that the samples in evidence are pure molasses and contain no commercial glucose; that if commercial glucose is contained in the samples it is due to chemical reaction since the shipment was initiated.

You will perceive, gentlemen, that this testimony, which is based on the skill and experience of the defendants, who have been engaged in this business for a number of years, is directly opposed to the testimony of the Government; so that you are to determine where the truth lies. Do you believe the testimony of the chemists, who have stated in the one case that 12 per cent of glucose was found in the sample submitted to them, and that in the other case 25 per cent of glucose was contained in the sample submitted to him? If so, the Government has proved its case and the defendant is guilty as charged in the information. Of course in reaching such a conclusion you should take into consideration the inferences that are drawn by the defendants, namely, that these samples were not fair samples; and in that connection I also call your attention to the testimony of the chemists that they were abundantly able to reach an accurate analysis or at least practically an accurate analysis. The witness Christianson testified that the molasses was bought from dealers in the West Indies and Cuba and elsewhere; that defendants' Exhibits A and B were tested by him, and in his judgment contained pure molasses. He is not a chemist, but he claims to be able to testify upon the subject from the long practical experience that he has had in this business, and he claims to be able to tell you that these samples did not contain any glucose, from merely tasting the samples.

Evidence is also given that at the time this molasses was received by the defendant it was submitted to a polariscope test and that that test was to ascertain the presence of sucrose, and as I understand the testimony, no direct examination was made to ascertain, with respect to the molasses from foreign countries, as to whether it contained glucose or not.

I do not think I need to discuss the evidence any longer. It is highly technical. You will remember the salient points of it. I have endeavored to direct your attention to it, but you are not to take my opinion or accept my suggestion with reference to any item of fact.

In the courts of the United States the presiding justice may state to the jury what his opinion may be in reference to testimony, in reference to the facts, as to whether a witness in his judgment is reliable or not; yet it seems to me that I ought not to do that in this case. The witnesses on the part of the Government as well as the witnesses on the part of the defendants have given testimony in your presence, and I believe that you are as able as I am, perhaps more so, to judge of the qualifications of these various witnesses and what weight should be attached to them.

The next question which it is important to dwell upon is whether in the absence of knowledge or intent to violate a statute these defendants should be convicted as charged. On that subject I charge you that in most offenses of a criminal nature it is essential that it be shown that the accused intended to [6] commit the offense charged. A person charged with crime ought not to be convicted if it appears that the offense was due to mistake or inadvertence, that there was an absence of intent to violate a statute. But is this such a case? Ordinarily the intent is inferred from the facts and circumstances and follows as a necessary consequence of the act; therefore if these defendants knew—and they are presumed to have known—what law Congress had passed, they are presumed to have known that it was a violation of the statute to misbrand merchandise that was shipped interstate. If knowing that fact it contained commercial glucose; if knowing that fact the commodity was not pure molasses, the commodity which had been ordered, then in my judgment the defendant must be held responsible under this act; for, in cases of this class the statute in effect provides that a dealer may defend on the ground of the absence of knowledge on his part when the article of food has been bought from a manufacturer residing in the United States, and when a guarantee was taken by him from such manufacturer that the article complied with the requirements of the act. I do not think that it is necessary for the Government to prove that the defendants, the shippers or dealers had actual knowledge of the contents of the barrels of molasses, or that it was misbranded. The pure food and drug act does not provide that shippers or dealers must intentionally violate its provisions, or that they must know the contents or character of the packages or barrels in which the goods are contained before they may be found guilty of misbranding. The only provision approaching the question of intent or guilty knowledge is the one already mentioned regarding a guarantee from the manufacturer living in the United States to the dealer that the merchandise is of the character specified. Hence the shipper must be presumed to have knowledge of the character of the shipments and that the manufacturer lived in a foreign country is immaterial. It is quite evident, gentlemen, that it would be comparatively easy for a dealer or shipper to escape punishment under the provisions of the act if he could be heard to claim that he had no knowledge of the misbranding. The intent follows from the act. In my judgment the true construction of this law is that the dealer or manufacturer sells the commodity at his peril, and he is bound to understand the ingredients of the product. The defendants in this case were bound to know whether the shipment was pure molasses, as that was understood in the trade, or whether it was a compound of molasses and glucose.

Testimony was given by the witness Hobart that just prior to the time when the act in question went into effect he instructed his superintendent Inslee not to ship goods unless they were properly branded as provided by the pure food law; that compounds should be properly branded; and the superintendent Inslee testified that he received instructions to obey the statute and not misbrand the goods but to ship them for what they actually were; that if compounds consisting of molasses and glucose were to be shipped they should be branded properly. Such were the instructions given by Mr.

Hobart, and there is no evidence here denying that they were given. But, gentlemen, there is no evidence here tending to show that any specific instructions were given with reference to the merchandise in question, and I think I will charge you as a general proposition of law that the defendants must be liable if the product was shipped interstate by their superintendent, and if he was authorized to run the factory or plant, and sell and deliver the product in the usual course of business, and if the testimony establishes that the superintendent had charge of the Hoboken plant and of the shipping of orders forwarded to him from New York by the defendants, and if you believe from the evidence that in the shipment of the merchandise specified in counts 1 and 2, he acted within the scope of his authority, and if you believe that in fact the shipment was mis-[7] branded, that is, if it was an imitation of molasses and known under and by the name of molasses compounds, or a compound of molasses and glucose, then the defendants as principals are liable for the acts of their agents. The act, section 12, specifically provides that the principal shall be liable for the failure of an agent employed by him when acting within the scope of his employment, that his act or failure shall be deemed the act or failure of the employer. As to whether the superintendent and manager Inslee acted in the scope of his employment the government has given testimony tending to show that he was in charge of the factory at Hoboken, that orders were usually sent to him from New York and that he filled them, that he had authority to fill them; he made the shipments and he supervised and managed the plant. If you believe such testimony, and as I recall it is not disputed, you are justified in reaching the conclusion that this instruction which is claimed to have been given to the superintendent does not relieve the defendants from responsibility.

Gentlemen, this is a criminal case and I am obliged under the rules of law to instruct you that you cannot find the accused guilty unless the Government has satisfied you upon the various elements required to be proven by it and to which I have already called your attention. The Government has the burden of proof and a mere preponderance of evidence is not sufficient; you must be satisfied beyond a reasonable doubt, not only that the shipment was interstate, but that the percentage of glucose, or approximately the percentage of glucose, was found in the samples that have been submitted to the chemists, and that such samples in fact were taken from the merchandise sold by the defendants, and that such samples had not been disturbed or admixed by any other person.

Something has been said with respect to the good character of the accused. In all criminal trials the good character of the accused is presumed, and it has been held to be a proper charge to a jury to say that this character very often will generate a reasonable doubt. The defendants in this case are entitled to the presumption of innocence, until their guilt has been established by the Government beyond a reasonable doubt; but by the term "reasonable doubt" is not meant a capricious or fanciful doubt. If you have such a doubt it should be based on testimony; it should be based on the showing of the Government, namely, that you disbelieve such showing, that the testimony is insufficient, that it is unreliable, that the chemists ought not to be believed because their tests were improper or not suffi-

ciently accurate. If a reasonable doubt arises in your mind with reference to any such matters which are salient and material in the case you should acquit the defendants. The facts of the case must be consistent with the innocence of the defendants and consistent with their guilt. You should not base your verdict in favor of the Government and against the defendants on mere surmise and conjecture. If they are guilty of the offense, as I have already had occasion to say, their guilt should be established upon the record beyond a reasonable doubt.

Take the case.

In due course the jury returned the following verdict: "Guilty on both counts without criminal intent." Thereupon counsel for defendants moved to set aside the above verdict, and for a new trial, and arrest of judgment, urging in support of said motion the following grounds:

(1) Because the jury has affirmatively found the elements of criminal intent to be lacking.

(2) For the reason that a suspension of sentence is in order here for each of the following grounds:

(a) Because the jury has expressly negatived criminal intent.

(b) Because it appears that the Government's last witness himself, at its request, tasted the molasses involved and reported that it did not contain [8] glucose, to judge by taste, though he said that where as much as 25 per cent of glucose was present you could tell it by taste.

(c) Because express written instructions from the defendants to their employees governed these two specific shipments, and were ignored by the court in its charge to the jury; the written shipping orders referring to the lot numbers of molasses which were to be used, and excluding the numbers indicating glucose or glucose compounds.

(d) Because the glucose, if any at all, was probably in at the time of the importation, or before the pure food law went into effect; and we could get no guarantee because of the non-residence of the persons from whom we bought the goods in the foreign country, and this particular importation took place before the pure food law went into effect with its specific provisions as to Government analysis in the custom house for importations subsequent to that date.

(e) Because the fact that we went to trial is no reason for increasing the penalty in view of the uncertainties of the law and its bona fides.

The court overruled the foregoing motion.

UNITED STATES v. S. GUMPERT & CO.

(Circuit Court, S. D. New York, November 21, 1910.)

N. J. No. 806.

Articles labeled "Maple Flavo," "Extract of Vanilla," and "Extract of Lemon Peel," held misbranded because they were imitations.

Informations alleging violations of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

[2] HAZEL, *District Judge* (charge to the jury). The United States attorney for this district has filed four informations in this case charging the defendant company with violating the Pure Food and Drugs Act, so called. The Pure Food and Drugs Act was passed by Congress in 1906 and was designed to protect the public from the adulterations of food and drugs, furthermore, it was designed to protect the public from being deceived by misbranding or labeling an article differently from what it is in truth and in fact.

Now, in this case, the Government is required to satisfy you beyond a reasonable doubt of the guilt of the accused on all of these various informations [3] and unless it has done so the defendants are entitled to an acquittal. Of course it is entirely within your province to find the defendant guilty of one or more of the alleged offenses contained in the various informations, or all of them, or not guilty of any. The Government is required to show affirmatively that this was an interstate shipment, because the jurisdiction of this court depends upon the claim contained in the information that the alleged misbranded merchandise was shipped or forwarded from the State of New York into another State. There is no controversy in relation to interstate shipment, and hence, you gentlemen doubtless will be able to reach a conclusion upon that subject without difficulty.

The Government is also required to show that the samples taken by the inspectors in each case were submitted to the chemists intact, were not mixed with other ingredients or deleterious substances, and this must be established by the Government to the end that you may be satisfied by the proofs that when the chemists made the analyses that the contents of the container were in fact the articles or goods that had been shipped or sent by the defendants interstate.

It must also appear beyond a reasonable doubt that the chemical analyses were true and correct, and if you are satisfied upon all these points as stated by me, then the defendant is guilty as charged in the information.

Now, we are chiefly concerned with articles named variously Maple Flavo, Extracts of Vanilla and Extracts of Lemon Peel. With reference to the extract of vanilla the defendant contends that there was no intention on his part to violate the statute, and he leaves the impression in my mind and perhaps in yours that he does not dispute the analysis made by the Government's witness Shanley, that the article was adulterated and misbranded as claimed by the Government. But to excuse such misbranding it is claimed on behalf of the defendant that the misbranding was an inadvertence or a mistake; and that is a question submitted to you for your consideration. As this, however, is a criminal case, the Government is required to satisfy you, as I have already intimated, that there was a misbranding, and because the Government is required to satisfy you upon that point it may not be amiss for me to recall to your mind that the witness Shanley, the expert chemist of the Government, testified that the product shipped to the witnesses Young and Heim, this extract of vanilla, was analyzed by him and that he found the samples were imitations of vanilla. He testified, in substance, that he found coumarin and vanillin in the samples submitted to him, and that they were artificially colored with caramel; that

he found there was twice the amount of vanillin in the samples, and that in the genuine vanilla extract there is no coumarin and not as large a percentage of vanillin. This is the evidence that is submitted now for your consideration upon the subject of whether the article that was shipped in interstate was misbranded and as to whether it was admixed with ingredients such as are necessary to produce the pure article. The claim of the Government, of course is, that this vanilla was not an extract of vanilla, and, as I have already indicated to you, that is not seriously controverted by the defendants. The defendants claim that the article was misbranded or mislabeled and that such misbranding or mislabeling was due to a mistake, and of that I shall speak later.

The expert witness Wilson for the Government testified that he made an analysis of the so-called Maple Flavo, and he found that it was chiefly made of cane sugar, glucose, slippery elm and largely colored with caramel, and that the ingredients of caramel was used to imitate the color of maple, and lovage [4] to imitate the Maple Flavo—in fact, it was an imitation of the Maple product. The witness explained that the maple product of the maple tree does not contain the same ingredients as Flavo, and that it contains neither vanillin, caramel, lovage or slippery elm. The witness Seeker, for the Government, testified that he analyzed the defendant lemon extract, so-called, and found the article contained no lemon oil; that it was colored with a coloring of lemon peel, and that citral was used by the defendant for flavoring; that citral is obtained from lemon grass; and he further testified that according to the standards fixed by the Association of Chemists and adopted by the Agricultural Department, lemon extract contains a solution of 5 per cent of lemon oil by volume in grain alcohol; that the first analysis of the defendant's product did not disclose oil of lemon. He further testified that extract of lemon peel is the same as an extract of lemon, and gives the same testimony with reference to the absence of terpenes, and that the product was an imitation of lemon extract.

This, gentlemen, is substantially the testimony of the Government, and it remains for you to say as to whether these chemists who testified as you will perceive upon the material point, are entitled to weight and as to whether their testimony is entitled to controlling weight upon the subject in reference to the analyses.

Now, the defendant has given testimony in his own behalf and he denies that he intended to violate the statute, and he undertakes to explain various of these transactions to which the information relates. Now, he claims that the term "Maple Flavo" used by him in the sale of his commodity is a distinctive name and the product became generally known by that name and that it became so known prior to the enactment of the Pure Food and Drug Act. Now, gentlemen, if the term "Maple Flavo" is used to mislead the public or cause it to believe that it was a pure maple product, then I instruct you it was a misbranding. The Government's claim is that the term "Maple Flavo" is false and misleading and that the compound was artificial flavoring. Now, if you find from the evidence that the defendant's designation was false and misleading and calculated to deceive the ordinary purchaser, then the article was misbranded and

the statute applies. Upon this question of whether the name "Maple Flavo" was distinctive, I instruct you that a distinctive name is one ordinarily used to clearly distinguish it or the article to which it is applied from all others, or one which the public might come to generally recognize as meaning something different from any other thing. Now, if you believe from the evidence Maple Flavo by reason of that name used by the defendants so completely distinguished it from the pure maple product as to readily inform the public the difference between it and the genuine maple product, then the defendant should not be convicted on count 1 of the information. In other words, if the defendants' article has been on the market long enough to inform the public generally that it was not a genuine maple product but merely a maple flavo, or imitation of the maple product, then this has an important bearing on the question of whether the public was misled or was deceived by the alleged misbranding. On the other hand, gentlemen, if you are not satisfied by the testimony of the defendant on this point, if you believe that the product has not become generally known to the public as one distinguished from the maple product, and that the word "Flavo" was merely a trade distinction and was used in connection with the word "Maple," and it deceived the public into believing that it was a product containing pure maple, then the defendants are guilty of misbranding. You will bear in mind, gentlemen, that the defendant, Mr. Gumpert, gave testimony generally to show that this article "Maple Flavo" was exhibited by him at various exhibitions here in this city and elsewhere, and [5] moreover it was exhibited in London, and he claims that it became widely known in various States, and so it became a distinctive product from what was ordinarily known by the term maple product. Now, if in that respect he has testified truthfully and you are satisfied by the evidence that his commodity did become distinctive, that it was ordinarily recognized by the public as distinctive, that it was not regarded as purely a maple product, he is entitled to an acquittal. If you believe this was simply a trade distinction used by him for convenience or used by him to beguile the public or lead the public to believe that his commodity really consisted of pure maple, then he is guilty of the count.

Now, as to the lemon extract, which the evidence indicates was sold to Mr. Young, the defendant claims that he used terpeneless lemon oil instead of pure lemon oil. He explained the method of manufacturing this product and claims it to be an extract. The point, however, according to the Government, turns on the requirements of the pure lemon oil, as to pure lemon ingredients of the lemon extract. Expert witnesses for the Government testified that the article was not a lemon extract, as I have already stated, in that it contained no lemon oil; that it was colored with a coloring of lemon peel and citral, and was used as a flavoring; that the true lemon extract is a solution of five per cent.

I think, gentlemen, this substantially states or recalls to you the evidence given on behalf of the Government, and substantially all the testimony given on behalf of the defendant to establish the innocence of the company, and there may be and doubtless is other testimony in the case which you ought to consider and which it is your duty to consider, in order to establish the guilt of the accused or their innocence.

Now, there is another question, however, to which your attention must be directed by the court, and that is the question of intent: As to whether the defendant intentionally committed the offense charged in the information. Now, gentlemen, in most criminal trials it is necessary for the Government to establish beyond reasonable doubt that the accused intended to violate the statute and the person charged with crime should not be convicted if it appears that the offense was due to a mistake or inadvertence—that is to say, absence of intent to violate the statute. Usually in criminal trials the intent is presumed from the facts and circumstances and follows as a necessary consequence of the act, hence the defendants if they knew that their product was an imitation of the other and was not a distinctive article, then you may assume the defendant must be held responsible under the act in question. The Pure Food and Drugs Act does not expressly provide that shippers or dealers must knowingly or wilfully violate its provisions, but if, as it is claimed by the defendants, this label was put on inadvertently or by a mistake by employees whom he had hired, and who had not become sufficiently familiar with their duties, it is my opinion then, gentlemen, that he ought not to be held guilty of these two counts. On the other hand, if it is your opinion that this claim made at this time is merely a subterfuge, that the article in fact was misbranded and that it is now claimed to have been a mistake, in bad faith, in order to escape liability under the statute, then manifestly you will give little heed to the claim of mistake or inadvertence. Of course, if a dealer in a commodity of this character is to escape punishment, if persons are to be permitted to misbrand their goods and send them into interstate commerce and then may be heard to say that they did not intend to violate the statute, if they are not to be held liable as a necessary consequence of their act, this statute which is now before us will not remedy the evils that Congress designed it to remedy by its enactment.

Now, gentlemen, there is another rule of law which it is my duty to call your attention to, namely, that the defendant cannot be convicted unless the [6] Government has established these essential elements to which I have drawn your attention beyond a reasonable doubt. By that term, however, is not meant a capricious doubt or one that may fancifully arise in your mind. If it exists at all it should be based upon the testimony, namely, that the Government has not satisfied you, that the evidence is not sufficient to justify you to believe that the defendants are guilty as charged. Moreover it would be well for you to bear in mind that the defendants are presumed to be innocent until the contrary is established. This presumption remains with them throughout the trial and follows you into your jury room until you are satisfied that the offenses are established by the Government.

Now take this case with the facts and circumstances and give it such consideration as you can.

Mr. HANSON. May it please the court, at one place in your charge, in referring to the evidence of one of the experts, I understood your honor to say that you understood him to testify that citral is not obtained from the lemon but from lemon grass. My recollection is that his testimony was that it was obtained not only from lemons but also from the grass, that it might be obtained from both.

Mr. SMITH. He testified commercially, that the citral sold commercially was obtained from the lemon grass.

The COURT. You will remember the testimony.

Mr. SMITH. I will ask the court to charge the jury that for all first offenses the law only provides that the defendant shall be fined.

The COURT. Yes.

Mr. SMITH. And this, I understand, is the first offense. And I also ask your honor to charge the jury the first section of subdivision 4 of the Food and Drug Act wherein it states: "In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names and not an imitation of or offered for sale under the distinctive name of another article"—that is subdivision first—right there, sir [indicating].

The COURT. I intended to read to you this provision of the act, for it bears on one of the defenses interposed by the defendant. The act provides as follows: "In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced." You may consider so much of the statute together with what I have already said on the subject.

You may now retire.

UNITED STATES v. ITALIAN IMPORTING CO.

(Circuit Court, S. D. New York, December 2, 1910.)

N. J. No. 832.

An article consisting principally of a cottonseed oil, labeled "Olio Sopraffino Savoia Brand Salad Oil" in large type, and in very small type, at the bottom of the label, "A Compound winter pressed cotton salad oil flavored with pure Italian olive oil, packed in United States complying with Pure Food Law," held misbranded.

Information alleging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

HAZEL, *District Judge* (charge to the jury). [2] This is another case of so-called misbranding of things sent from New York State into another State. It is conceded by the defendant that the article in question is cottonseed oil; that it contains five per cent of olive oil and 95 per cent of cottonseed oil, and the Government claims that the branding of the article, or branding on the container, the words "Olio Sopraffino Savoia Brand Salad Oil," deceives the public and leads the ordinary purchaser to believe that he is getting olive oil of a foreign production when in fact he is getting a spurious article.

Now, the witness Eginton, who gave testimony for the Government, substantially testified, if I recall his testimony, that salad oil is commonly known in the trade as olive oil, and other witnesses for the Government have testified that by the mere words "Olio Sopraffino Savoia Brand Salad Oil," Italians or persons of Italian birth, believe that olive oil is meant by such designation. Now, the term olive oil has a dictionary definition, and Judge Lacombe not

long since had occasion to examine into a similar question that was presented to him, and upon looking at the dictionaries as to its definitions, found that the Century Dictionary, Worcester's Dictionary and the Encyclopedia all defined salad oil as olive oil. Webster does not give any definition. So that the dictionary definition apparently defines salad oil as synonymous with olive oil. Now while that is conceded to be true by the defendant, it claims nevertheless that this term "salad oil" in connection with cottonseed oil has received a wide and distinctive designation; that the dictionary definition is not universal in that the public generally, the buying public generally, understand by the term superimposed or branded upon this can the real meaning, namely, a production of cottonseed oil and not of genuine olive oil; that in fact the term in trade and commerce has come to mean other oils than salad oil. If you believe this to be the fact, that consumers, the public generally, or persons generally who use this commodity would not be misled by this inscription on the container and that the defendant's commodity is not misbranded by the use of the words "Olio Sopraffino Savoia Brand Salad Oil," and unless you believe the other words and that the style of the can misleads the user, your verdict should be one of acquittal. On the other hand, if you believe from the testimony of the Government and the manner in which this article is put upon the market that people who use this commodity or the public generally are led to believe by reason of the phraseology to which I have already referred and the configuration of the can, that they were actually buying olive oil whereas in truth and in fact they were only receiving cotton oil or a spurious oil, then your verdict should be in favor of the Government. If, therefore, the term "salad oil" in connection with the other words on the can requires a distinctive trade designation, the defendant is not guilty of misbranding. Upon that subject the defendant has called a number of witnesses, one of them at least a dealer in cotton oil, and he testifies that cotton oil is very largely used in this country, and that it is used as a substitute for olive oil. Perhaps this is some evidence that should be taken into consideration, and yet it would seem to have no particular bearing on the question as to whether the public generally, the people who use this commodity, are misled or not. As to whether [3] the public generally is misled by the article must be taken by you from the evidence as to how the user and consumer of the article views the can and inscription, and upon that subject there is some contradictory testimony, and it is for you to determine it.

This is a criminal case. The Government is required to substantiate the charge contained in the information beyond a reasonable doubt, and likewise the defendant is presumed to be innocent until the contrary is established. Of course, you will bear in mind that Congress in enacting the Pure Food and Drugs Act had in mind the protection of the public, and in mind the punishment of persons who misbrand their merchantable or vendable articles.

As I have already indicated, it is not claimed that cotton oil is deleterious or harmful to the health of the user, but persons who go into the market to buy olive oil should not have foisted upon them cotton oil. So that these are matters you should have in mind. I don't think I need say anything further. I think you are thoroughly familiar with all the facts, and that you will take the matter and

return a verdict as your judgment dictates. Perhaps you should bear in mind that the can contains other words than those I have specifically mentioned. On the lower corner is found the word "Compound" in parenthesis and the "Winter Pressed Cotton Salad Oil Flavored With Pure Italian Oil." Then with relation to this inscription, added to the one I have already spoken of, the Government claims it is not sufficient and is misleading, and is not a sufficient warning to the purchaser as to the character of the commodity that he is buying.

UNITED STATES v. 2,000 CASES OF CANNED TOMATOES.

(Circuit Court of Appeals, Fifth Circuit, December 6, 1910.)

N. J. No. 875.

Canned tomatoes *held* adulterated and misbranded in that they consisted in whole or in part of decomposed and putrid matter and contained salts of tin, an ingredient deleterious to health.

Libel filed in the District Court of the United States for the Northern District of Texas, under section 10 of the Food and Drugs Act.

R. G. Charles, a resident of the State of Maryland, appeared and filed an answer to said libel, claiming to be the sole owner of the two thousand cases of tomatoes involved and excepting and objecting to said libel on the ground that he was not furnished one of the three samples of the product involved, which were taken by an inspector of the United States Department of Agriculture; that he was not furnished a copy of the findings made in connection with the examination and analysis of said samples; that by reason of the lack of a copy of said findings he was unable, when cited to a hearing, to submit intelligently oral or written evidence impugning such findings; that only a small percentage, not over 4 per cent, of the cans in question were bad; that the defective character of such bad cans was visible on superficial examination; and averring that the contention that the presence of such small number of bad cans rendered the entire shipment subject to condemnation and forfeiture was a taking of the defendant's property without due process of law, and therefore in violation of the fifth amendment of the Constitution of the United States, and praying the dismissal of the libel, that the property seized be returned to the claimant and that he be dismissed with all his costs.

On exceptions to libel and answer by claimant. Exceptions overruled. Jury waived. Issues submitted to the court (Edward R. Meek, District Judge). Decree of condemnation and forfeiture. Costs assessed against claimant.¹

Reviewed on writ of error by the Circuit Court of Appeals for the Fifth Circuit. Affirmed.

[1] Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

By the COURT: In this case the lower court found and decreed on evidence supporting the same, as follows:

On this day came on to be heard the above entitled and numbered cause, and R. G. Charles appeared as claimant to the property therein libeled, after having given cost bond as required by the statute, and thereupon came the United

¹ Decree of district court published in N. J. No. 555.

States of America, libelants, by their district attorney, William H. Atwell, and the claimant in person and by his attorneys, and each and all announced ready for trial.

The matters of law, as well as of fact being submitted to the court without a jury, the court is of the opinion, after having heard the pleadings and testimony and being advised as to the law, and having heard the argument of counsel, that the allegations of the libel are true and that the tomatoes libeled are interstate commerce, from the State of Maryland to the State of Texas, intended for food, and that a portion of the two thousand cases of canned tomatoes is unfit for food, in that the same is decomposed and contains putrid matter, and further that the same contains salts of tin, an ingredient deleterious to health; and it further appearing to the court that there are [2] in said two thousand cases of canned tomatoes some good cans and some bad cans, as hereinbefore described; and it further appearing to the court that the said two thousand cases of canned tomatoes were seized by the United States Marshal under the said libel, and from the return of the said officer it appears that the same said two thousand cases of canned tomatoes are still in his possession:

Now, therefore it is ordered, adjudged and decreed that the said United States marshal for the Northern District of Texas, shall separate the good cans from the bad cans, which said bad cans are herein and hereby condemned, and that after such separation the said marshal shall deliver to the claimant, R. G. Charles, such cans as are good, and shall destroy such cans as are bad.

It is further ordered, adjudged and decreed that the costs of this proceeding shall be taxed against the claimant, the said R. G. Charles, and that the marshal shall be reimbursed for such expenses in carrying out this judgment as under the law he is entitled to, to be charged and taxed as other costs.

This decree was executed by the marshal and acquiesced in by the claimant who received the good cans and paid the costs.

Now whether we consider the case here to be on writ of error or in the nature of an appeal and all of the assignments of error to be well taken, the only actual relief lies in the matter of costs which, in the court below, have been voluntarily paid by plaintiff in error, and in no case can be adjudged against the United States, *Stanley v. Schwalby*, 162 U. S. 255-272; and which in admiralty practice are within the discretion of the Court, from which no appeal lies. *Dubois v. Kirk*, 158 U. S. 58-67, and cases cited, unless perhaps in case of gross abuse of discretion.

We therefore decline to consider the questions argued as to the constitutionality of the Pure Food and Drugs Act of June 30, 1906, and as to the construction of that act in regard to whether manufacturers can exempt their goods from seizure thereunder by contract and surety from consignees not to violate the act, and other questions that seem to be academic.

The decree of the district court is affirmed.

UNITED STATES v. F. E. ROSEBROCK & CO.

(Circuit Court, S. D. New York, December 16, 1910.)

N. J. No. 825.

A frozen egg product, containing formaldehyde, and consisting in whole or in part of a filthy, decomposed, and putrid animal or vegetable substance, held adulterated.

Information charging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

[2] *HOUGH*, *District Judge* (charge to the jury). The act of Congress under which this information is brought, and about which

so much is heard nowadays, not only in the court room but in the public print, is (in its application to this particular transaction,) as follows: The introduction into any State from another State of any article of food which is adulterated is prohibited, and the person who ships such article of food from one State to another, (and person means corporation also,) shall be guilty of a misdemeanor,

Now the word "adulterated" is of course one of very wide, or rather uncertain meaning, and therefore for the purpose of this act it is defined with great particularity as meaning in the case of food, two things, which are relevant to this trial: An article of food is adulterated if it contains any added poisonous or other added deleterious ingredient which may render such article injurious to health. It is also for the purpose of this act deemed adulterated (although the word cannot be used in that sense ordinarily,) if it consists in whole or in any part of a filthy, decomposed or putrid animal or vegetable substance.

The act then continues, although the rest of this section does not I think relate to this case, but it shows the general scope of the act, "or if it consists of any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter." I have read that merely to show the general scope of the legislation in this regard.

What is charged in this information and what is therefore on trial before you, is composed of two parts, that is, the charge is of two parts. The first is, that these eggs which are the subject of investigation contained formaldehyde, and it is said that formaldehyde is a deleterious ingredient which may render an article injurious to health; and it is also charged, irrespective of the formaldehyde, that the eggs themselves were filthy, decomposed or putrid. Now, probably there is nothing so difficult in the world as a definition; some time when you have an opportunity, try to make an accurate full complete definition of anything, say a coat, and you will find it very hard; but from dictionaries and from the questions put to witnesses, and the study I have given the matter; I charge you that the meaning of the word "putrid" is, that a putrid substance is in such a state of decay as to be fetid or stinking from rottenness; an article which is decomposed is an organic body, (as are eggs) reduced or being reduced to a state of dissolution by the processes of a natural decay, and an article which is filthy or dirty, noisome or nasty.

Take up the last word first; after some consideration I have concluded and so instruct you that inasmuch as it is a matter of common knowledge that an egg is not of itself dirty, such an article, namely, an egg, may become putrid or decomposed by the simple process of decay and the resultant or natural causes, but it will not become filthy, unless something be added thereto which renders it dirty, noisome, or nasty.

There is no evidence in this case that the eggs which are the subject of this investigation, had become filthy in that sense; therefore you will divide your consideration of this case into two parts: The first inquiry is, was there formaldehyde added to these eggs, and if there was formaldehyde added to these eggs, what is the nature of formaldehyde, both of which are questions of fact. On the other hand, you have the statement of defendant's president, that he is the

manager of the business, and that in that business, the defendant so far as he knew, never bought any formaldehyde since it was in operation. On the other hand, you have the statement of the chemist who testified that formaldehyde by well-known scientific tests was found to be present in the product when it was examined in Washington, and that, just like every other question of fact, is for your consideration alone.

[3] If you find there was formaldehyde in this substance, then it appears to me you would be justified in inferring from the evidence on both sides that formaldehyde is what is known as an irritant, that is, it produces such a condition of irritation of the soft linings of the digestive tracts that if taken in sufficient quantity, it is injurious to human health. If, therefore, on the first branch of the case, you should be of the opinion that these eggs, no matter how bad they were, or how good they were, did contain formaldehyde, and you should be sure of the opinion that formaldehyde has a discoverable odor and was an ingredient so deleterious, that it might render the eggs injurious to health, then the Government has maintained that branch of the proposition.

But entirely irrespective, as I have said, of the presence or absence of formaldehyde, the Government's contention is that the eggs were putrid and decomposed. But there was no smell discernible, so you have to come to the formaldehyde proposition, because it is said that formaldehyde disguises smell. But you have further to determine (irrespective of formaldehyde, and irrespective of putridity,) whether the decomposition of these eggs had progressed so far that the eggs were in common parlance rotten.

Now, to approach this question, as in an everyday business manner; it is perfectly fair to ascertain what is it, that you would have asked for, if you wanted to buy the article that Worischeck bought? The trade name by all the evidence appears to be frozen eggs. What are frozen eggs? In the first place, they are broken. Naturally, the inquiry arises why are they broken? In the next place, the contents of the egg shell are strained through a sieve-like article; and the inquiry is perfectly natural; why are they strained? In the next place, the whites and yolks are mixed. Again the inquiry, why? When this product, strained and mixed, was collected, in the month of February, 1910, the trade price at which those articles were sold, was 18 cents per pound, which according to the witnesses who averaged nine eggs to the pound, makes 24 cents per dozen; and tanners' eggs are worth four cents per pound. Why was all this done; what is the effect of the freezing, and what is the effect of the preservative formaldehyde, if there was a necessity for a preservative, and if there was in fact formaldehyde present?

It appears to me, that by all the testimony, the action of both cold and preservative, if there was any, was to arrest decay; further, I think it is perfectly fair to assume by all the testimony, leaving however the question of fact to you, that eggs are frozen, and the commercial article of frozen eggs exists for the purpose of arresting decay in the eggs so frozen.

Now, it is to be remembered that this is an article of food, and if an article of food be in such a state that it be deemed desirable to arrest decay by cold or preservatives or both, then it follows that in

that article, (as testified to by both sides and all of the scientific experts here,) when the cold is removed, and the action of the preservative exhausted, decomposition will reassert itself, and progress even more rapidly than before.

The question, therefore, would seem to be perfectly fair, can a person who deals in frozen eggs, or other articles that may be preserved by cold or otherwise from the process of decay, such preservation being temporary only, rely upon instant use? What is reasonably to be expected, if an article is sent forth in trade for sale and distribution; and in the particular case of frozen eggs, what is to be expected in the distribution and sale thereof to bakers, for insertion into such articles of their product as may require eggs?

So, according to my understanding, when those eggs got to Washington on February 12th or two days after they were sold, you are asked to believe by the prosecution that the eggs were then in such condition as would reasonably be expected by any person who put them forth for food consumption, unless they were to be eaten, absolutely frozen.

[4] Now, so far as the scientific knowledge which has been exposed to us, I am frank to say that a great deal of it falls off me, and I strongly suspect that a great deal falls off you, very much like the proverbial water off a duck's back; but I think that this result may be taken to have been shown by the scientists on both sides: There may be bacteria or bacilli without decomposition, but there cannot be decomposition without the presence of bacilli or bacteria. Decomposition when carried far enough will usually result in organic bodies in putrefaction, which is an advanced stage of decomposition, with a fetid odor; the odor of putrefaction can be temporarily concealed by certain chemicals, of which formaldehyde is one.

Now, says the Government, from the quantity and kind of bacteria discernible in this particular shipment of eggs—it is for you to say whether at a time, and in a condition that might reasonably have been expected as the time and condition of consumption—do the eggs show such an advanced stage of decomposition as to bring them under the condemnation of the act? which I interpret, to the best of my knowledge to mean that those eggs were in common parlance rotten eggs.

This, gentlemen, I believe to be the whole case. Returning again to the two propositions, which I have before indicated; if you are of the opinion that formaldehyde was present in the shipment in question, if you are further of the opinion that formaldehyde is a deleterious ingredient, that may render the article containing it injurious to human health, that alone is sufficient to warrant a verdict of guilty. If you are of the opinion that there was no formaldehyde in that article, but if you are of the further opinion that the eggs were decomposed, in the sense of being in common parlance, rotten, that fact is sufficient to warrant a finding of guilty. If you are of the opinion that there was no formaldehyde, and if you are further of the opinion that the eggs were not in such a stage of decomposition as to entitle them to be termed rotten, then you should bring in a verdict of not guilty.

In this case, no matter whether the person or party proceeded against is a corporation or not, this being a criminal case, it is just as necessary to find the result to which you arrive in favor of the prose-

cution beyond a reasonable doubt, as in any other case. During other trials in which you jurors of the present panel have been sitting, I have had occasion to define the meaning of the words reasonable doubt; I do not think it is necessary to repeat it. I assume I am talking to intelligent men.

UNITED STATES v. VON BREMEN ET AL.

(Circuit Court, S. D. New York, December 20, 1910.)

N. J. No. 1949.

An article labeled "Imported Salad Oil Morel Brand" held misbranded in that such form of labeling misled and deceived the purchaser into believing that the product was olive oil, whereas it was not olive oil but sesame oil.

Information charging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.¹

HOUGH, *District Judge* (charge to jury). In taking up this, the last case of our session together, I shall not waste time in speaking to men who have been here before me for nearly three weeks, regarding the burden of proof, presumption of innocence and nature of reasonable doubt. I take it for granted that you understand those matters. And also at the session now ending probably every one of you has heard enough about the pure food act to approach your Christmas dinner with greater caution, if not greater intelligence; and, therefore, I shall only point out that this indictment comes under what is commonly called the misbranding section of the act.

These defendants sent from New York to Galveston in interstate shipment, an article which bore on its exterior just these words "Imported Salad Oil, Morel Brand." That article is said by the Government to have been misbranded, which the act declares, shall mean (among other things) this: Any article of food, the label on which shall bear any statement regarding such article of food, that is false or misleading in any particular. Such statement constitutes a misbranding of the article of food. Now, the Government in this information asserts that this label by the use of the words "Imported Salad Oil" without more, did contain a statement both false and misleading. False means, of course, untrue. Misleading means calculated to deceive, actually tending to deceive. I do not think either word is at all difficult to understand.

Therefore, of course, the first inquiry is, what does salad oil mean? Now, without any reference to dictionaries (about which a great deal has been said), it seems to me that the evidence adduced here, shows that there was a time not within the memory of some of the younger of us when salad oil meant olive oil, and it did not mean anything else. Therefore, you may assume that the first—original—or *prima facie* meaning of the words "salad oil" was olive oil.

But that phrase, like any other, may acquire in time, and be used in, a trade, a commercial, a secondary, or a wholly new, meaning by the public. Now, that is the inquiry for you, viz.: Whether salad oil has acquired a new or secondary meaning.

¹ Reversed, *Von Bremen et al. v. United States*, p. 500, *post*.

If so, what is it? The defendants say that the words "salad oil" have now come to mean an oil which serves for salad as indeed does olive oil in some of its preparations, but which is not necessarily olive oil; and in its trade signification in the United States is not olive oil at all, but an oil made from cotton, sesame, peanuts, and perhaps, quite recently, Indian corn. The question is not whether sesame oil, and cotton seed oil and peanut oil are good to eat; if we want to eat those articles, we can eat them all we like; the question is merely about this label.

What is the effect as reasonably judged by reasonable men of that particular label, upon the public? Is that label false? That is, is it untrue, according to the understanding of the buying public? Is that label misleading, in the sense that it is calculated to deceive the buying public?

The defense practically asserts that the public has been "educated" (to use the expression of one of the defendants who went upon the stand), though not by sesame oil, which is the oil in this case. You will recall that Mr. McMonnies said the education of the public was a matter of some difficulty, but it has been educated, say the defendants, in the use of the phrase salad oil, and that education has been received from the enormous and long continued use of cotton seed oil for salad; for the purposes of olive oil; and then has been further educated by the smaller use of the other enumerated oils; until the public as represented by a fair and reasonable man recognizes, when such a man asks for "salad oil," and another person hands out to him something labeled "salad oil," that he is getting something which is not olive oil.

The prosecution, on the other hand, asserts that the public has not accepted that knowledge of the dealers. The prosecution says there was once a considerable portion of the public which consumed olive oil on salads, they called it "salad oil," and knew no other; but when ingenious manufacturers found substitutes for the original product of the olive, those dealers called their product salad oil. Now, says the prosecution, that was done in order to conceal the substitution, and incidentally, perhaps, it may be inferred to keep up the prices. I may frankly say that it seems to me admitted as proven that the sale of cheaper oils as salad oils, has long progressed in this country, has attained large dimensions; but it is nevertheless urged upon you by the prosecution that such sales and such trade however large, and however long continued, has always been based upon a misleading of the public, and still is so based.

I shall not recapitulate the evidence to you. You happen to be dealing here with a substance with which we are all more or less familiar. The question is for you as reasonable members of the public, not (so far as known) identified with or particularly interested in either the manufacture and sale or the importation and sale of any brands of oil; it is for you as reasonable members of the body of citizens who are entitled to know so far as labels can tell you what it is you are eating. Are you of the opinion—if such reasonable representatives of the reasonable public have offered to them bottles of oil, or cans of oil—labeled on the outside "Imported Salad Oil," would such reasonable men be misled in this day and generation into believing that when they buy "Imported Salad Oil" they are

buying olive oil? If on your oaths you are of the opinion that such men would be so misled, then these defendants are guilty. If you are of the opinion that such reasonable men would not be misled, and would know or ought in reason to know that they were not getting olive oil, but were getting some other kind of oil which was suitable for salad, then the defendants are not guilty.

Mr. BOYESEN. I would like to request your honor to charge the jury that the question for their determination is not whether isolated instances of deception of purchasers through their own carelessness or ignorance might occur through the defendants' sale of goods bearing the label in evidence, but whether that label tends to deceive the purchasing or consuming public generally.

The COURT. The question is whether that label tends to deceive a reasonably intelligent member of the public.

Mr. BOYESEN. I except.

Will your honor charge the jury that there is no question that pure sesame oil is an oil fit for use as a salad oil and that they are to determine whether it is misbranded when branded "Salad oil." Further, that that question will depend on whether it is or is not, in the language of the statute, "An imitation of or sold under the distinctive name of another article." That they must either find that all oils, except olive oil, fit for use as salad oils are imitations of olive oil, or that the term "salad oil" is the distinctive name of olive oil, in order to convict the defendants.

The COURT. I decline that. The question for the jury is simply whether this particular label is or is not false or misleading. It is not an issue in this case whether sesame oil is pure oil or good oil or a good oil for salads. The question is as to the label, not as to the quality of the oil, although I must say that it seems to have been admitted here that sesame oil is pure oil and can be used for salads. It seems to me, as far as I recall the evidence, entirely harmless.

Mr. BOYESEN. I except to your honor's refusal to charge as requested. I also ask your honor to charge the jury that to find the defendants guilty, they must either find that sesame oil is an imitation of olive oil or that the term "salad oil" is its distinctive name.

The COURT. I will not charge just that. The question is whether this label is calculated by its wording or nature to deceive the public into believing that it is getting olive oil.

Mr. BOYESEN. I respectfully except. I also ask your honor to charge the jury that they are entitled to consider on the question of the credibility of the Government's witnesses the fact that they are all importers of olive oil, who might naturally be interested in excluding all other oils from the American salad oil market.

The COURT. Well, I think I will charge that. And I will also charge that an equal number of the defendants' witnesses are manufacturers of cotton seed oil.

Mr. BOYESEN. Yes, that is so.

Mr. STEPHENSON. I would request your honor to charge that if the jury find that this label is either misleading or false, that they must find the defendants guilty. They don't have to find both.

The COURT. Yes; and I may add to that, that in my opinion the sum and substance of both those words, for the purposes of this case, is the same.

Mr. STEPHENSON. I ask your honor further to charge that even if this label were not false or misleading to people in the trade, they must find the defendants guilty if they find it is false or misleading to the ordinary purchaser.

The COURT. I have so charged.

The defendant moved to set aside the verdict on the ground that it was against the weight of evidence and contrary to law, and also moved for a new trial and in arrest of judgment. Motions denied.

UNITED STATES v. UNION PACIFIC TEA COMPANY.

(Circuit Court, S. D. New York, December 20, 1910.)

N. J. No. 2700.

If there is a trade meaning authorizing the contention that the terms "Orange Flavoring" and "Orange Extract" are synonymous, it should be pleaded in an information charging that an article labeled "Orange Flavoring" was misbranded because it did not comply with the standard for orange extract.¹

Information charging misbranding in violation of the Food and Drugs Act. On demurrer to information. Demurrer sustained.

The article in question was labeled:

2 oz. 20¢. 2 Checks Sovereign Orange Flavoring. Manufactured and sold only by the Union Pacific Tea Company, Washington and Laight Sts., New York.

A sample of the product was analyzed in the Bureau of Chemistry and found to be a very weak alcoholic solution of orange oil containing only about 20 per cent of the amount of orange oil that should be present in orange extract. Misbranding of the product was alleged in the information for the reason that it was labeled as set forth above, which label was false and misleading, in that it denominated the article as "Orange Flavoring," whereas in truth and in fact it was a very weak alcoholic solution of orange oil containing only about 20 per cent of the amount of orange oil which should be present in an orange extract.

[2] HOUGH, *District Judge*. The sum of the pleading is that an article labeled "Orange Flavoring" is misbranded because it contains no more than about 20 per cent "of the amount of orange extract."

It follows that to succeed, the prosecution must show that orange "flavoring" is, in strength at all events, identical with orange "extracts." There may be a trade meaning to those words authorizing the contention, but if so it should be pleaded. As the information stands, nothing is alleged to change the accepted dictionary meaning of the words. By reference to standard works it seems to me plain that while probably every extract (i. e., essence or tincture) is a flavoring substance, not every such substance is an extract. It must be held therefore that identity of "flavoring" and "extract" is not averred, nor is the right to measure a lawfully branded flavoring by lawful extract shown.

¹ See also *United States v. St. Louis Coffee & Spice Mills*, p. 196, *ante*; and *United States v. Edward Weston Tea & Spice Co.*, p. 222, *ante*.

The case referred to by demurrant (Nave-McCord, etc., Co. v. United States, 182 Fed. 46) is not opposed to the foregoing, but the points decided seem to me different. Demurrer sustained.

UNITED STATES v. 443 CANS OF FROZEN EGG PRODUCT.

(District Court, D. New Jersey, January 4, 1911.)

N. J. No. 1027.

A frozen egg product containing sugar, and alleged to consist in whole or in part of a decomposed substance, *held* not adulterated.¹

Libel under section 10 of the Food and Drugs Act. Jury waived. Case tried to the court. Decree for claimant. Libel dismissed.

CROSS, *District Judge* (orally). This is a suit brought by the Government against 443 cans of frozen egg product, to condemn this egg substance, under the pure food law; the Government claiming that, under that [2] law, the article must be deemed to be adulterated in two respects; under the second subdivision of section 7, if any substance has been substituted wholly or in part for the article, and, under the sixth subdivision of the same section, if it consists in whole or in part, of a filthy, decomposed or putrid animal substance.

The charge under the sixth subdivision of section 7 has been limited so that only the word "decomposed" is now relied upon. A bill of particulars was furnished whereby the words "filthy" and "putrid" were eliminated. So, as just stated there remains but two points for consideration—first, whether any substance has been wholly or in part substituted for the article, and, second, whether the food product under examination has been shown to be decomposed.

It has been admitted in the case that this egg mixture is a food product and that it was transported in interstate commerce. I understand that no question is raised about that.

The Government is the moving party herein, and the burden of proof, therefore, rests on the Government to establish, by the weight of the evidence, the allegations of its petition of forfeiture. The Government must not only establish its case by the weight of the evidence, but, this being a case involving the forfeiture of property, the evidence must be of a clear and convincing character.

Under the second clause of the seventh section, I shall dismiss the Government's charge at once. I do not think, under the evidence in the case, that that clause has been violated; that is, I do not think that the egg product in question is adulterated within the meaning of the second subdivision of section seven. It is the very article that it was intended to be—the very article that was intended to be made and sugar was a part of that article. This is not a case of misbranding. The article is made under a patent, or at least a similar article is patented—and I do not think that the introduction of sugar under the circumstances disclosed, adulterates the article within the meaning of the act. It is made just as it was ordered

¹ Reversed in Circuit Court of Appeals, p. 507, *post*. Circuit Court of Appeals reversed in Supreme Court, p. 582, *post*.

and as it was directed to be made; that being so it is not clear why sugar adulterates the article any more than the putting of salt and pepper into canned soup would adulterate that article, assuming that the soup was to be seasoned.

The only question remaining, therefore, is whether this egg product was decomposed in whole or in part, and, in determining whether or not it was so decomposed, that word must be given its ordinary signification. It is not used in any technical sense here, and should not have any such meaning given it.

The question is whether in the ordinary sense of the word the article was in whole or in part decomposed. I do not think it was under the evidence.

There has been a great deal of technical testimony given by experts upon both sides of that question, which testimony, as I look at it is in direct conflict. Under the Government's expert testimony, the substance was apparently decomposed, while if you look at the other expert testimony, that in behalf of the claimant, it certainly could not be so considered.

I think the Government has not sustained the burden of proof which rested upon it to show, under the expert testimony, that this egg product was decomposed, either in whole or in part, and if we look at what might be called the lay testimony—the testimony as to tasting, smelling and baking or the practical uses of the substance—it has likewise failed. I think the claimant has really borne the burden of proving that this egg product was not decomposed. The Government has not, therefore, sustained, the burden of proof which rested upon it, but, on the contrary, the clear weight of all of the testimony given is with the claimant and not with the Government, and accordingly my finding is in favor of the claimant.

The United States appealed from the foregoing judgment to the United States Circuit Court of Appeals for the Third Circuit, assigning error as follows:

ASSIGNMENT OF ERRORS.

[3] First. The said court erred in dismissing the libel filed by the United States of America in this cause.

Second. The said court erred in making, entering and rendering a decree in said cause in favor of the said claimant H. J. Keith Company, and in adjudging that the frozen egg product seized in this cause should be released by the marshal of this district.

Third. That the said court erred in making and entering a decree in said cause that the frozen egg product seized in said cause was not adulterated within the meaning of the act of Congress entitled "An act for preventing the manufacture, sale or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines and liquors and for regulating traffic therein and for other purposes" approved June 30, 1906.

Fourth. That the said court erred in making and entering a decree in said cause that the frozen egg product seized in said cause did not at the time of said seizure consist in whole or in part of a decomposed animal substance within the meaning of the act of Congress known as "The Food and Drugs Act June 30, 1906."

Fifth. That the said court erred in admitting in evidence, and in considering as an element in the case, the contract marked "Exhibit D 1," being a contract between the Waldorf Pound Cake Company and the H. J. Keith Company.

Sixth. That the said court erred in admitting in evidence, and in considering as an element in the case, United States Letters Patent Number 955,825 for preserving eggs, issued April 19, 1910, to H. J. Keith Company.

Seventh. That the court erred in not finding that the frozen egg product in question was adulterated within the meaning of the act of Congress known as "The Food and Drugs Act June 30, 1906."

Eighth. That the court erred in not finding that the frozen egg product in question consisted in whole or in part of a decomposed animal substance.

Ninth. The said order and decree is contrary to the law and the evidence.

UNITED STATES v. 3,000 POUNDS OF FROZEN EGGS.

(District Court, D. Connecticut, January 13, 1911.)

N. J. No. 873.

Frozen eggs held adulterated in that they consisted in whole or in part of a filthy and decomposed substance.

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict for libelant. Decree of condemnation and forfeiture.

PLATT, *District Judge* (charge to the jury). [2] We have reached the last stage of the interesting inquiry which has been before you for the last two or three days, and the labor of the case now really falls upon your shoulders. It happens to be a case of that description in which the court's duty is nominal and your duties are the important and essential ones in the determination of the issue there is between the Government and these claimants.

You have undoubtedly observed, as the case has been presented that I have been extremely liberal in my presentation of the testimony before you for your consideration, and I conceive that no fault can be found by either party to the controversy about the privilege which has been accorded them in presenting the case in such a way that in their view you will be able to arrive at a just conclusion.

This is a somewhat peculiar action, arising under the Pure Food and Drug Act, as counsel have already explained to you several times, which was passed in 1906 and which puts under the control of the Government the investigation of drugs and food so far as they are concerned with interstate commerce; that is, so far as they are transported from State to State to form part of the general commerce of the country, aside from the individual commerce carried on here in Connecticut or in New York or in any other State of itself.

You understand, of course, that the frozen eggs against which this libel pleads are concededly the subject of interstate commerce and within the province of the Government under the Pure Food and

Drug Act to take action on. Whether the Government can do what it desires to do depends entirely upon the conclusion which you gentlemen reach as to the character of this product.

The Government says that this shipment of eggs was adulterated within the meaning of the act of Congress and the manner in which it was adulterated is set forth in the libel as follows:

(a) The said article of food, to wit—three thousand (3,000) pounds, more or less, of frozen eggs, ~~was~~ and was at the time of said shipment and delivery decomposed and filthy and of a poisonous and deleterious character.

Right around that statement of the Government centers the issue upon which you are to pass, gentlemen. The Pure Food and Drug Act doesn't use the words "unfit for food." That particular expression isn't found in the act, but when it describes an adulterated article as one which is "decomposed and filthy," it means undoubtedly unfit for food to the extent that it would be improper and unfit food for me or you or any other citizen of this country to indulge in.

The burden of proof, you understand, I presume, gentlemen, is upon the Government, which presents that allegation that the article was of a poisonous and deleterious character. The Government is bound, by a preponderance of the evidence that has been presented to you during the last three days, to have satisfied your minds as reasonable men that their contention is true that upon this testimony which has been presented to you it is your duty to find that these frozen eggs were decomposed, filthy and poisonous and deleterious in character. Now, I don't think that you are bound to find that all of those characteristics exist in this product which is under consideration by you. I don't think it necessary for you to find, upon the evidence presented by both parties to the controversy that the frozen eggs were not only decomposed, but filthy and also poisonous and also deleterious. Of course, it goes without saying that if they are decomposed to the extent that they are unfit for human food, they might reasonably be called filthy and deleterious and perhaps in a sense poisonous. [3] If they are unfit for food, there must be a certain element of poison about them. But that is the entire issue upon which you have to pass, and it all depends upon the view which you take, gentlemen, of the testimony which has been presented to you since the case opened, first on behalf of the Government, and then on behalf of the claimants. I don't think it my duty to occupy your time with a review of that testimony in extenso. It is fresh in your minds and you have listened to it with care, and I am sure with intelligence, and I expect you, when you retire to your room for consultation to apply to the evidence presented by both parties the ordinary rules of reason and common sense which you apply to every other issue that arises for your consideration and judgment as you pass along through life. I am willing to take it for granted that you will not be respecters of persons, that you will let no feeling of sympathy govern you in your considerations, but that you will treat the matter as a purely abstract proposition.

A certain amount of so-called frozen eggs has been seized by the Government because, as the Government avers, it is in the condition referred to, and it is for you to say whether, in the testimony presented to you, the Government has sustained the averment and satisfied you that they are in that condition.

The Government has produced, as you will remember, two gentlemen from Washington connected with the department that is engaged in carrying on investigations under the provisions of the Pure Food and Drug Act, Dr. Bates and Dr. Stiles, who have both told you about the way in which they obtained samples of the article in question, what they did with them, how they treated them and what the results they found were, and, after telling you what results they obtained, they gave you their conclusions as experts that, containing the things that they say the article contained, the article itself is filthy, decomposed and deleterious. In addition to that, Dr. Wolff, whom I presume is known to some of you, who is in charge of the health department here in the city, has told you about his experience and has given you his opinion, based upon, as I remember it, the condition of the article as testified to by Dr. Bates and Dr. Stiles, that if they have given you correct reports of the condition of the article, he considers it an entirely improper article to be distributed and sold under the Pure Food Act.

In their evidence, the claimants have described to you the place in which they produce and make this food, and you remember all the details of how they make it and the location of the room in which the frozen product is prepared. All this is fresh in your minds. It is unnecessary for me to enlarge upon it.

You, I presume, gentlemen, have had sufficient experience in the line of the duty you are now engaged upon to know that in the consideration of the evidence it is not a mere question of counting heads; if it were, it would be the Government's case without question because they presented Dr. Stiles and Dr. Bates, who both told you about what they found, and the claimants have been contented to present Dr. Smith, who told you what he found in examining the same product. It won't turn, of course, in your minds upon the fact that two say one thing and one says the other, but it is for you to make up your minds which line of expert testimony it strikes you is the most reasonable and it is for you to determine, as I said before, which line of thought with reference to the matter of the frozen eggs; seems the most reasonable way of approaching it. You recollect Dr. Smith says it isn't enough to find out how many bugs there are in a quarter of a teaspoonful of the product. (I believe he says he found 18,000,000.) It doesn't follow from that that they were bad bugs. It is fair to say, however, it seems a fair inference to make, that if he did find 18,000,000, he would think it worth while to apply the acid test in order to be sure one way or the other. You will also remember that Dr. Wolff told you the acid test is not a recognized test in such cases and is not used by boards of health the country over. I think Dr. Smith says that he himself has confidence in it, but he doesn't state that he is following the rest of the scientific investigators when he performs it.

[4] I don't think it worth while for me, gentlemen, to delay you in your work. I want you to approach the matter fairly and apply your ordinary common sense which was born in you and which it is your duty to apply to all matters that come before you for your decision. I shall trust you to arrive at the proper verdict after consultation among yourselves.

You may now retire.

UNITED STATES v. THREE BARRELS OF VANILLA
TONKA AND COMPOUND.

(District Court, W. D. Texas, January 14, 1911.)

N. J. No. 1306.

In libel proceedings under section 10 of the Food and Drugs Act, *held* incumbent upon the libelant to introduce evidence showing that notice had been given to the party from whom the sample was taken and that he had been given an opportunity to be heard pursuant to the provisions of section 4 of the act;¹ also to show that the article libeled was shipped *for sale*.²

Libel under section 10 of the Food and Drugs Act for the condemnation and forfeiture of three barrels of a product labeled "Vanilla Tonka and Compound—Manufactured by the Hudson Mfg. Co., Chicago, U. S. A. Guaranteed under the Food and Drugs Act, June 30, 1906." Hudson Mfg. Co., claimant. Jury waived. Libelant's evidence heard by the court. Libel dismissed.³

DECREE OF THE COURT.

MAXEY, *District Judge*. [2] This cause coming on to be heard this 11th day of January, A. D. 1911, the parties hereto appeared in open court by their counsel and announced ready for trial, and a jury being waived the matters of law and fact were submitted to the court without a jury; and the United States of America, libelant, having introduced and closed its evidence and the court finding therefrom that the three barrels charged to be Vanilla Tonka and Compound, seized and libeled herein were not transported or shipped for sale, but were shipped for the purpose of being used by the Creamery Dairy Co. in the manufacture of ice cream and purchased and held by it for that purpose, and the United States of America, libelant, having failed to introduce any evidence showing that the Secretary of Agriculture had caused notices to be given to the party from whom the sample was obtained and given him an opportunity to be heard as prescribed in section 4 of the act of Congress of June 30, 1906, regulating such proceedings; and the court being of opinion as a matter of law that the property libeled herein cannot be condemned because it was not transported for sale as above indicated, and being also of the opinion as a matter of law that the proceedings against property in such a case can in no event be had without the notices referred to having been given by the Secretary of Agriculture and an opportunity for a hearing allowed, as provided by said act, is of the opinion that it is unnecessary to consume further time of the court in hearing the defendants' evidence: It is, therefore, ordered, adjudged and decreed that the United States of America, libelant herein, take nothing by this its suit and that the libel proceedings herein be dismissed. To which action and judgment of the court, libelant, United States Government, in open court excepted and gave notice of appeal, and by consent of parties is allowed six months from the date hereof to perfect its appeal herein; and it is therefore hereby ordered by the court that the libelant, United States of America, is allowed and given six months from date hereof in which to perfect its appeal herein.

¹ Contra, *United States v. Morgan et al.*, p. 494, *post*.

² Contra, *Hipolite Egg Co. v. United States*, p. 378, *post*.

³ Appeal dismissed, *United States v. Three Barrels Vanilla Tonka and Compound*, p. 586, *post*.

UNITED STATES v. 165 CASES OF BI-CARB-SODARINE.

(District Court, W. D. Tennessee, January 16, 1911.)

N. J. No. 1610.

Libel alleging misbranding of an article labeled "Bi-Carb-Sodarine * * *" held not to state a violation of the Food and Drugs Act.

Libel under Section 10 of the Food and Drugs Act, alleging misbranding of 105 cases and 60 cases of a product labeled "Bi-Carb-Sodarine, a wonderful leavening preparation—Sodarine—Better than Soda—Better than other bread preparations. Ingredients: Sodium, aluminum sulphate, corn starch, sodium bicarbonate, available carbonic acid gas when packed 16.66 per cent—net weight not less than 16 oz.—(L. G.) The Sea Gull Specialty Co., Baltimore, Md.," alleging misbranding and praying condemnation and forfeiture.

Misbranding was charged in the libel for the reason that the product was an alum baking powder and contained a large quantity of alum, while the labels and brands on the packages of the product declared it to be entirely different from and superior to the leavening agents ordinarily used; such statements were therefore alleged to be false and misleading because the product was composed only of ordinary leavening agents.

The Sea Gull Specialty Co., Baltimore, Md., appeared as claimant and filed a demurrer to the libel. Demurrer sustained. Libel dismissed.

[2] McCALL, *District Judge*. The only thing that I can deduct from the label complained of in this proceeding is that the manufacturers thereof state that their leavening preparation was better than soda and better than any other bread preparations. I do not think that the act was intended to include within its condemnation such a label or publication. The result is that the demurrer will be sustained and the libel dismissed with costs.

UNITED STATES v. LORICK & LOWRANCE.

(District Court, E. D. South Carolina, January 17, 1911.)

N. J. No. 877.

Turpentine, containing 3.2 per cent of mineral oil, held adulterated.

Information charging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

STATEMENT OF FACTS.

On or about May 8, June 22, and July 1, 1908, Lorick & Lowrance, Columbia, S. C., shipped from the State of South Carolina into the State of Virginia three barrels of a product invoiced and sold as spirits of turpentine. Samples of this product were procured and analyzed by the Bureau of Chemistry, United States Department of Agriculture, and mineral oil was found to be present. As the find-

ings of the analyst and report made indicated that the product was adulterated within the meaning of the Food and Drugs Act of June 30, 1906, the Secretary of Agriculture afforded Lorick & Lowrance and the parties from whom the samples were procured opportunities for hearings. As it appeared after hearings held that the said shipments were made in violation of the act, the Secretary of Agriculture reported the facts to the Attorney General with a statement of the evidence upon which to base a prosecution.

In due course a criminal information was filed in the District Court of the United States for the Eastern District of South Carolina against the said Lorick & Lowrance, Incorporated, charging the shipments above referred to and alleging the product so shipped to be adulterated in that it was sold as and for pure spirits of turpentine, when in truth and in fact it was adulterated because it contained 3.2 per cent of mineral oil.

CHARGE TO THE JURY.

By the COURT. The court is requested by the learned counsel for the defendant to give you certain instructions:

1. The information being for the violation of the act by the shipment of turpentine alleged to have been adulterated by the addition of mineral oil, if the jury believe [2] from the evidence that turpentine is a commodity the bulk of which is used for mechanical purposes and only a small percentage is used as a drug, the jury can not convict, unless it has been shown by the evidence—beyond a reasonable doubt—that the defendant knew that the shipment in question was intended for use as a drug.

I can not give you that instruction. I am doubtful whether it is a correct statement of the law. Without passing upon that, where a case might arise in which that instruction might be pertinent and important, the court is of opinion that in this case there is sufficient evidence to go to the jury that the defendants were advised that this particular turpentine was to be used as a drug, because the paper which I hold in my hand is the first letter which was addressed by the Hite Company, Roanoke, Va., to the defendant company, and that has in broad, plain letters at the top of it, these words: "Dr. S. P. Hite Company, Inc., Manufacturers of Hite's Pain Cure and Other Remedies, also Flavoring Extracts, Staple Drugs, etc.," and in the corner there is a bottle, "Hite's Pain Cure, the Greatest Internal and External Remedy," and the letter is as follows: "Please quote us your bottom price on pure spirits of turpentine in 5 gallon, $\frac{1}{2}$ and one barrel lots." That is sufficient advice to this defendant company that this particular shipment of turpentine was to be used as a drug.

2. The information in this case alleging three different shipments of adulterated turpentine, and the evidence tending to show only one instance of adulteration, the jury can not convict, unless the evidence connects—beyond a reasonable doubt—the turpentine analyzed with some one particular shipment.

I can not give you that instruction; it would be misleading. The testimony of the manager of the Hite Company was that this turpentine was obtained from Lorick & Lowrance, that there were three shipments, one in May, one in June, and one in July; he was uncertain as to which package this particular turpentine which was sent to the Williamson Grocery Company was taken from. It was taken from one of the three. Now, if the case were otherwise made out, it is uncertain which package this turpentine was taken from, if you

are satisfied beyond a reasonable doubt that it was taken from any one, you will consider the testimony as to which one of the packages was most likely to be the one that this turpentine came from. If you believe that it came from any one of the three it will be sufficient, and you will find your verdict, guilty or not guilty, as the case may be, on whichever count you think it most likely that this package, which is most likely from the testimony that this turpentine came from.

3. The jury can not convict in this case unless the evidence has shown beyond a reasonable doubt that the turpentine alleged to have been analyzed was from some one of the barrels alleged to have been shipped by the defendant.

The court gives you that instruction, that is you must be satisfied beyond a reasonable doubt that the turpentine alleged to have been adulterated came from one or the other of those three shipments by Lorick & Lowrance.

The testimony shows that Hite and Company ordered three times, and that three separate shipments were made, and that out of the three, possibly the three commingled, that certain packages were made up in small bottles, such as have been produced in testimony, and sent to the Williamson Company, West Virginia, some time early in the year following the shipment; that the Government inspector bought from Williamson and Company several of these boxes filled with these small bottles of turpentine, and upon analysis it was found that the turpentine was adulterated, that it was not pure; that there was three to three and two-tenths per cent of mineral oil in it. If you believe that testimony, then the only question left for you is whether or not the turpentine was adulterated when it was shipped by the defendants. On the part of the defendants it has been testified that this turpentine was bought from distillers in the adjoining counties; they are uncertain as to the particular parties from whom this particular turpentine was bought; that the practice of that company [3] was that when turpentine was received to subject it to certain examinations, and they have produced here the instrument by which they examined it, a hydrometer, that demonstrated, for all their purposes, that it was pure turpentine. On the part of the Government, it is contended that the hydrometer that defendants employed was not such as would enable Lorick & Lowrance to ascertain whether or not there was mineral oil in the turpentine, that that is not a process which would demonstrate the presence or not of mineral oil. You have heard that testimony, you have to determine from it whether or not that contention is true. If you believe, and you must believe from the testimony, that the turpentine was adulterated, then you must determine whether or not it was adulterated before it was shipped, whether by Lorick & Lowrance, or by the parties from whom they purchased. If it was adulterated after it passed from their possession, whether in transit on the railroad, or whether it was adulterated by Hite and Company, or by Williamson and Company, after it was received by them, then you can not hold Lorick & Lowrance responsible. You must be satisfied beyond a reasonable doubt that it was adulterated before it was shipped. It is the shipping of the adulterated drugs which gives this court cognizance of the offence. If you have reasonable doubt about it you must give the defendants the benefit of the doubt.

UNITED STATES v. FRANK ET AL.

(District Court, S. D. Ohio, W. D., January 21, 1911.)

189 Fed. 195; N. J. No. 823.

An information alleging that defendants shipped in interstate commerce an article of food labeled "Extract Terpeneless Lemon" which was adulterated and misbranded because it contained no more than 0.05 per cent of citral derived from the oil of lemon, whereas, as recognized in the trade generally, and by the Standards of Purity for Food Products, established by authority of act of March 3, 1903, c. 1008, 32 Stat. 1158, such extract should contain at least 0.2 per cent by weight of such citral, *held* to state facts sufficient to sustain counts for adulteration and misbranding in violation of the Food and Drugs Act.¹

Information under section 2 of the Food and Drugs Act. Judgment on plea of guilty.

[197]² HOLLISTER, *District Judge*. The United States filed an information against Jacob Frank, Charles Frank, and Emil Frank, doing business under the firm name and style of the Frank Tea and Spice Company, charging them with having unlawfully shipped and delivered for shipment from Cincinnati to a firm at Mount Sterling in Kentucky, one gross bottles of a certain article of food purporting to be terpeneless lemon extract, marked "P. & S. Brand Extract Terpeneless Lemon Artificially Colored. The Frank Tea & Spice Co., Cincinnati, O.," and that the same was adulterated in that a dilute solution of alcohol and water was substituted in part for said terpeneless lemon extract so that the same contained no more than five one-hundredths of one per cent (0.05%) of citral derived from the oil of lemon; whereas, it should contain at least two-tenths of one per cent (0.2%) by weight of citral derived from the oil of lemons, as required by the standards of purity of food products, established by the Secretary of Agriculture in accordance with the provisions of the act of Congress, approved March 3, 1903, 32 Stat. 1158.

The information also charged that the dilute solution of alcohol and water was mixed and packed as and with said article of food so as to reduce and lower and injuriously affect the quality and strength of the article of food purporting to be terpeneless lemon extract.

For a second count the information charges that the article of food called "terpeneless lemon extract" was misbranded in that the statement on the bottles that the article contained therein was extract terpeneless lemon was false and misleading in that the article did not contain at least two-tenths of one per cent of oil product by weight of citral derived from the oil of lemon, and did in fact contain only five-hundredths of one per cent (0.05%) of citral, and that the same was not terpeneless lemon extract as recognized in the trade generally and in the standards of purity of food products established by the Secretary of Agriculture in collaboration with the Association of Official Agricultural Chemists, approved by act of Congress, March 3, 1903, c. 1008, 32 Stat. 1158.

¹ See *United States v. St. Louis Coffee & Spice Mills*, p. 196, *ante*, in which the Standards of Purity for Food Products (Circular 19) were held not to govern in determining what constitutes adulteration under the Food and Drugs Act.

² Numbers in brackets refer to pages of Federal Reporter.

The defendants, believing, as admitted in open court, that only a nominal fine would be imposed upon a plea of guilty as for a technical violation of the pure food law, pleaded guilty.

The defendants having within some six or seven months prior to the filing of this information pleaded guilty to two so-called technical violations of the pure food law, and being thereupon fined only in nominal amounts, the court on this plea imposed a fine of \$200. Thereupon the [198] defendants deeming themselves aggrieved, and upon the urgent solicitation of their counsel, the court permitted counsel to file a brief in support of the proposition that no offense in fact had been committed under the laws of the United States. Counsel for the defendants submitted an elaborate brief to which the district attorney filed a brief in answer.

Upon consideration of these the court is of opinion that there is an offense against the laws of the United States charged in this information, and sees no reason why, under the circumstances of the case, the fine imposed was too large.

On March 3, 1903, the Congress appropriated a sum of money to the Department of Agriculture for the fiscal year ending June 30, 1904, for the purpose, among others, "to enable the Secretary of Agriculture, in collaboration with the Association of Official Agricultural Chemists, and such other experts as he may deem necessary, to establish standards of purity for food products and to determine what are regarded as adulterations therein, for the guidance of the officials of the various States and of the courts of justice. * * *"

The information alleges that the standard of purity for terpeneless lemon extract was established by the Secretary of Agriculture and it appears aliunde that in the publication of Department of Agriculture, Circular No. 19, the the following: "Terpeneless extract of lemon is the flavoring extract prepared by shaking the oil of lemon with dilute alcohol, or by dissolving terpeneless oil of lemon in dilute alcohol, and contains not less than two-tenths (0.2) per cent by weight of citral derived from oil of lemon."

That the Secretary of Agriculture had the constitutional power under the act of 1903 to establish standards for purity of food products is not disputed, nor could it be under the decisions of the Supreme Court of the United States. He adopted the standard for the article of food in question as alleged in the information. The allegation of the information is that the standard so established was existent at the time of the filing of the information.

On June 30, 1906 (Act June 30, 1906, c. 3915, sec. 2, 34 Stat. 768 [U. S. Comp. St. Supp. 1909, p. 1188]), the Congress provided: "That the introduction into any State * * * from any other State * * * any article of food * * * which is adulterated or misbranded," (within the meaning of this act) "is hereby prohibited." And the offender, "shall be guilty of a misdemeanor and for such offense be fined not exceeding two hundred dollars for the first offense, and upon conviction for each subsequent offense not exceeding three hundred dollars or be imprisoned not exceeding one year, or both, in the discretion of the court."

The act further provides that an article shall be deemed to be adulterated, in the case of food, "if any substance has been mixed and

packed with it so as to reduce or lower or injuriously affect its quality and strength," and shall be deemed to be misbranded, "If the package containing it or its label shall bear any statement, design, or device regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular."

The claim of the defendants is that the statute does not distinctly [199] incorporate the standards fixed by the Secretary of Agriculture within the provisions of the food law, and it does not therefore define a criminal offense.

The answer to this is that if the Secretary of Agriculture had the power to fix standards and did fix a standard of this food product, which standard was in existence at the time the food law was passed, and the information charges wherein the article was adulterated and misbranded with respect to this standard, there seems to be no room for doubt that if upon proof that the article did not conform to the requirements of the standard of purity established by the Secretary of Agriculture, then an offense has been charged under the laws of the United States.

The defendants claim that the act of 1903 was a mere appropriation law, but it would seem that a law appropriating a certain sum of money to the Secretary of Agriculture for the purpose of doing certain things which he could constitutionally do for the purpose of fixing standards of purity of food and that he did so fix them, carries with it a necessary implication that he could do that for which the money was appropriated to him for the purpose of doing, and when he fixed the standards then those standards prevailed unless they have been changed since. It does not appear that they have been changed.

The defendants claim that as the act of 1906 does not incorporate the standards fixed by the Secretary of Agriculture, the act of the Secretary was legislative in character, and hence no criminal offense could be predicated upon it. It is also claimed that since the act of 1906 in describing drugs, refers to the Pharmacopœia or National Formulary, and in describing what food is, refers to no standard at all, Congress has not fixed any standard for food. Both of these claims are based on a misapprehension. Section 6 of the act of 1906 provides:

That the term "drug," as used in this act, shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of diseases of either man or other animals. The term "food," as used herein, shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound.

These are mere terms of description. If the Pharmacopœia or National Formulary says something is a drug, it is a drug under the meaning of the act. Or if it comes under the other description of what a drug is, it is a drug, and so food also is described. There are no standards fixed in either case, for, if any substance or mixture is intended to be used for the cure, mitigation, or prevention of disease of either man or other animals, it is nevertheless a drug whether it is recognized in the Pharmacopœia or National Formulary or not. The standard for food was fixed by the Department of Agriculture under the act of 1903. If one in the business of making food products

would look for the standard he would find it in the promulgations of the Secretary of Agriculture made under direct authority of Congress. The act of 1903 does not describe any offense, but the act of 1906 says that if any article of food adulterated or misbranded is [200] manufactured or transported so as to become the subject of interstate commerce, the maker, transporter, etc., shall be guilty of an offense. How shall it be known whether he is guilty of an offense or not? The answer is clear, by referring to the standards which have been established under the authority of Congress.

The Secretary of Agriculture, under authority of Congress, fixed the standards of purity for certain foods. This is a fact upon which the law of 1906 operates. It is not a law. The law of 1906 under which the offense is charged to have been committed says what food is. The offense charged is that the defendant transported a food and that it was adulterated and misbranded. How is this to be ascertained? By looking to the standard as a fact.

The question is dealt with in *Coopersville Co-operative Creamery Co. v. Lemon*, 163 Fed. 145, 89 C. C. A. 595. It appears that the oleomargarine act, May 19, 1902, c. 784, sec. 4, 32 Stat. 194 (U. S. Comp. Stat. Sup. 1907, page 637) provides that "any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk or cream" shall be deemed "adulterated butter," and authorizes the Commissioner of Internal Revenue to decide what substances are taxable thereunder. It also authorizes him, with the approval of the Secretary of the Treasury, to make all needful regulations for carrying the act into effect. It was held that such a regulation, providing that butter containing 16 per cent or more of water, milk or cream should be classified as "adulterated butter" under the act, was within the authority so granted, and was valid, being neither an exercise of legislative or judicial power, but merely a determination as a question of fact of what constitutes an "abnormal" quantity of water, etc., upon which the application of the statute is made to depend.

Judge Lurton, speaking for the circuit court of appeals, says:

The contention that the delegation of authority to promulgate such a regulation is to delegate either legislative or judicial power to an executive officer is founded upon a misapprehension of the character of the authority delegated. That Congress cannot delegate legislative authority or power to any executive official or board of officials is elementary. To do so would be destructive of our whole system and scheme of government. *Field v. Clark*, 143 U. S. 649, 691, 12 Sup. Ct. 495, 36 L. Ed. 294. That the delegation of authority to add to or take from a law would be to delegate legislative power must also be conceded. But that Congress may enact a law and delegate the power of finding some fact or state of things upon which the operation of the law is made to depend is equally clear. *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294; *In re Kollock*, 165 U. S. 526, 17 Sup. Ct. 444, 41 L. Ed. 813; *Union Bridge Co. v. United States*, 204 U. S. 364, 386, 27 Sup. Ct. 367, 51 L. Ed. 523. The authority to make all needful regulations not inconsistent with law is not a delegation of power to add something to an incomplete law nor a grant of judicial power. It is only an authority to determine the fact upon which the operation of the law is made to depend. Congress might have made the necessary tests and might have acquired the knowledge of the butter-making art to enable it to have enacted that adulterated butter should consist of butter having a moisture content of 16 per cent. or more. But that would have been an unnecessary detail, for it was altogether competent to declare that butter which contained [201] an abnormal quantity of water, milk, or cream should be classified as adulterated

butter, and that the fact as to what was, in dairy butter, an abnormal proportion of water, milk, or cream should be determined by a regulation of the Commissioner of Internal revenue, with the approval of the Secretary of the Treasury.

It surely can make no difference that the authority to establish the standard was not in the act itself creating the offense as in the oleo-margarine law. It may be well said that the Food and Drugs Act of 1906 was made with special reference to the standards of food fixed by the Secretary of Agriculture under prior authority of Congress.

It is true that the case of the *United States v. St. Louis Coffee & Spice Mills*, 189 Fed. 191, decided May 22, 1909, in the District Court for the Eastern District of Missouri, bears out the contention of the defendant, but in a subsequent case, *United States v. Edward Westen Tea & Spice Company*, decided November 30, 1909, the same Court submitted to the jury a case necessarily involving the same question. If he at that time entertained the opinion expressed in the other case he would not have permitted the case to go to the jury.

The court is of opinion that the information charges an offense. There is some doubt in the court's mind as to the propriety of passing upon this question of law at all. The defendant before pleading guilty had the opportunity to demur to the information, and, having many months in which to make up his mind what to do, pleaded guilty. Not until the imposition of a fine unexpectedly large did he raise the question here discussed. It is probable that the fine having been imposed on the plea of guilty the matter has passed from the power of the court to the pardoning power. The court has no intention of making this case a precedent which may be followed in similar cases. If persons charged with an offense against the laws of the United States with ample time to prepare their defense, assisted by able counsel, nevertheless pleaded guilty and a fine was imposed, it is difficult to see upon what ground they have right to appeal to the court by an attack upon the legality of the proceeding.

The court has only looked into the subject lest some injury has come to the defendants through their own plea of guilty.

The Food and Drugs Act is one of the most beneficent legislative enactments of recent times and its provisions must be observed.

UNITED STATES v. SCHUCH.

(District Court, D. Colorado, January 26, 1911.)

N. J. No. 1049.

Two drug products, labeled as "Radio-Sulpho" and "Radio-Sulpho Brew," held misbranded in that the labels bore numerous false and misleading statements regarding the therapeutic effect of such articles and the ingredients and substances contained therein.

Indictment found by the grand jurors of the United States for the District of Colorado, charging Philip Schuch, jr., with violations of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

LEWIS, *District Judge* (charge to the jury). [3] The defendant, Philip Schuch, jr., is on trial under an indictment which charges him with the commission of two separate criminal offenses. These offenses charged in the indictment are in violation of the act known

as the Food and Drugs Act, passed by Congress in 1906. That act, among other things, provides that the introduction into any State or Territory, or the District of Columbia, from any other State or Territory, of any article of food or drugs which is misbranded, within the meaning of this act, is prohibited, and any person who shall ship, or deliver for shipment, from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, any such misbranded drugs shall be guilty of a criminal offense. That act further provides that the term drug, as used in this act, shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals. It also provides that the term "misbranded," as used in the act, shall apply to all drugs, the package or label of which shall bear any statement regarding such article which shall be false or misleading in any particular.

The indictment, in its first count, charges that the defendant knowingly and unlawfully did sell and ship, and deliver for shipment, for interstate carriage from the city and county of Denver, in the District and State of Colorado, to and into the District of Columbia, an article and preparation of drugs called Radio-Sulpho, which article was misbranded in that the labels on the package containing said Radio-Sulpho had thereon the following, "Radio-Sulpho, Remedy for Rheumatism, Diseases of the Skin, Ulcers, Running Sores, Putrid Wounds, Pus, Gangrene, Bloody Flux and Chronic Dysentery." "Radio-Sulpho, a Remedy for certain forms of Cancer, Syphilis in any form; dissolves and removes Poisons absorbed into the Skin of Printers, Painters, Artists, and Metalworkers. A Remedy for Rheumatism, Skin Diseases, Ulcers, Running Sores, Uric Acid and Blood Poisons." And it charges that the defendant, Philip Schuch, Jr., then and there well knew that the said statements were false and misleading, and that the said packages, in the particulars just referred to, were misbranded.

The charge in the second count of the indictment is similar in the respects noted, in that the defendant is charged with knowingly and unlawfully selling and shipping, and delivering to be shipped, the preparation offered in evidence called Radio-Sulpho Brew from the State of Colorado to the District of Co- [4] lumbia, and that said package containing Radio-Sulpho Brew was misbranded, in that it contained the following inscriptions, "Radio-Sulpho Brew, Blood Purifier and Tonic for Indigestion, Constipation, Catarrh, Nervousness, Bloating, Turbid Liver and Kidney Disorders. Is a Laxative, and prevents Appendicitis. This great Remedy is Highly Beneficial for Sufferers with Asthma and Consumption, for it rids the System of all Obnoxious Substances." And the charge is also contained in this count of the indictment to the effect that the defendant, when he so sold, shipped and delivered for shipment the two packages of Radio-Sulpho Brew offered in evidence well knew that said bottles containing the same were misbranded.

Now the question for the determination of the jury in each count of this indictment is whether or not the defendant did, as is charged in these counts, ship from the State of Colorado to the District of

Columbia the Radio-Sulpho and the Radio-Sulpho Brew, and whether or not both, or either, of these preparations were misbranded in the particulars mentioned as to the inscriptions contained on the packages of these preparations, in that they made false representations as to their curative properties, and that the defendant, at the time he so shipped the same, did not know that they were curatives for those purposes.

These are criminal charges, and the rule applicable in all criminal cases for the guidance of the jury is, of course, applicable here to the effect that a defendant in a criminal case is not called upon to prove his innocence; the presumption of law is that he is not guilty, and this presumption abides with him throughout the case until it is overcome and his guilt has been established by the testimony; and it must be established, before you can find him guilty on either count, by the testimony to your reasonable satisfaction, beyond a reasonable doubt. A reasonable doubt, however, does not mean a mere possibility of innocence; it means a substantial doubt, founded on the evidence in the case, or the lack of evidence. If, after you have considered all the testimony in this case you cannot say to yourselves that you are convinced of the defendant's guilt, then you have a reasonable doubt and you must acquit him; but if, on the other hand, after carefully considering all the testimony in the case, you can say to yourselves, under your oaths, that you have an abiding conviction that the defendant is guilty as charged in the indictment, then you have no doubt and you must return, in that event, a verdict of guilty.

Now you are the sole judges as to what the facts are; you determine the facts in the case, the court determines and tells you what the law applicable to the facts in the case is. You take that testimony and applying it to the rules of law given you by the court you thereon render your verdict. You are also the judges, and the sole judges, of the weight of the evidence and of the credibility that you will give to the testimony of each witness; the court has nothing to do with determining the credibility of the witnesses who testified before you, or the weight to be given to the testimony of those different witnesses. You might discover, or might think you discover, that the court was of a certain opinion about the facts, or about the credibility of some particular witness, and yet if what you thought the court believed in that respect did not correspond with your belief about it you ought to follow your own convictions, and not permit what you might think the court thought about it to influence you in any wise. The law vests with you the sole duty and the sole power of determining what the facts are in the case. As a principle of law, however, the court tells you that if you should believe that any witness has knowingly and wilfully testified falsely to any material fact you are at liberty to disregard all of the testimony of such witness, except in so far as it may be corroborated by other [5] facts and circumstances in the case; and in determining what weight you will give to the testimony of each witness you should consider the apparent disposition of that witness to tell the truth, his familiarity with the facts about which he attempts to speak to you, his intelligence, his candor, his fairness, his interest, if any, in the case and the result of this trial, and then, with those as guides, give to the testimony of each witness such weight, and to him such credibility, as you, in your good judgment, believe it entitled to receive.

Now, I shall consider and comment upon some of the evidence in this case, having you clearly understand that I do not do so for the purpose of indicating what the impression of the court is as to what the facts are, but simply, after having heard a trial continued over some four or five days, of briefly calling attention to the prominent facts that you will necessarily have to take into consideration, and calling attention, perhaps, to some conflicting testimony in the case, for the purpose of having you consider these conflicts when you retire to determine what the facts are and what your verdict shall be. Some of these inscriptions on the package containing the Radio-Sulpho represent it to be a remedy for certain diseases. Those representations must be taken in their popular sense, because the evident purpose of the representations on those different packages were representations to the public and not simply to professional men who are schooled in chemistry and physics, and the word remedy, in its ordinary sense, means that which cures a disease—any medicine or application which puts an end to disease and restores health.

Now we come to notice the inscriptions first on the Radio-Sulpho; it is said to be a remedy for rheumatism; several witnesses testified that they had taken it for rheumatism and in their belief they had been cured. The weight of that testimony, when considered in the sense in which it was represented on the package as being a remedy for rheumatism, cannot, of course, be properly determined until we know in a given case whether or not first the patient actually had rheumatism. These witnesses were permitted to testify that they had rheumatism, it is for you to determine whether or not in fact they did have rheumatism; if you believe that that ailment is of such common prevalence, and has reached such common knowledge among men, that any man, and especially these witnesses who came before you and testified that they did have rheumatism, that they were able to diagnose and correctly tell you that their ailment at the time was rheumatism, then you have established that fact, and the only other fact for your consideration in reference to that ailment would be the inquiry as to whether or not the use of Radio-Sulpho, or Radio-Sulpho in connection with Radio-Sulpho Brew, effected the cure. If you so found that would go far to sustain a finding on your part that Radio-Sulpho is a remedy for rheumatism.

It also represents that it is a remedy for diseases of the skin, ulcers, running sores, bloody flux and chronic dysentery. There were one or two witnesses who testified to having some sort of affection of the skin; I believe one witness yesterday, the old gentleman, said he had eczema for many years and that Radio-Sulpho cured him almost instantly. The same rule, the same suggestions, that I have made in reference to rheumatism, of course, apply to each of these others, first, the inquiry as to whether or not he had a disease of the skin; secondly, whether or not there is evidence in this case that Radio-Sulpho will cure such a disease. Now, as against this testimony of these witnesses who told you that they had had some of these ailments and had been cured by taking these remedies, you have the positive testimony of men who have been schooled in the profession of medicine and in chemistry, and they tell you that the analysis made by Dr. Kimberly and Dr. Hill does not disclose anything [6] that could possibly be a remedy, or cure, or help in any respect for any of the diseases mentioned on the bottles offered in evidence. You cannot weigh the

testimony and reach a correct determination as to rheumatism by considering the testimony alone of the witnesses who came before you and said that they had rheumatism and were cured of it, without considering with it the testimony of these gentlemen who have made it a life study, who have pursued at schools instituted for that purpose the different effects of the different drugs, and compounds of the different drugs, that may possibly be any aid in the kind of diseases mentioned on these packages. Men may be mistaken about as simple a disease as rheumatism. I do not say they were mistaken; it is for you to consider whether or not, in connection with the testimony of the witnesses on the part of the Government, their statements that they had rheumatism and that these remedies cured that rheumatism are convincing to that effect.

It is also claimed on those packages that this Radio-Sulpho is a remedy for certain forms of cancer. A great deal of evidence has been devoted in describing to you what cancer is. Mr. Schuch was permitted to testify that he was competent to diagnose cancer, and his competency, as disclosed, was obtained, as he said, by studying that particular disease under eminent specialists who had made it their life work, and among others Dr. W. T. Bull of New York. You will recall what he said about that, what Dr. Bull did—gave him private lectures or instructions and took him with him to see his patients. It was contended on the part of the Government, and some evidence was offered for the purpose of showing that the defendant did not know Dr. Bull, couldn't possibly have been with him, because, as counsel for the Government say, he was described by the defendant in appearance a different man than the description given of him by Dr. Powers, who was his associate and partner for some eleven years. And that you must determine. It was also claimed by the defendant that he studied this same disease at Chicago under some two or three physicians who had made it a specialty, and in connection somewhat with Doctor Harper. Some testimony was given as to the profession and the life work of Doctor Harper, and that it was wholly devoted to biblical investigations, and while at Chicago, during the time the defendant says he met him and associated with him and paid him \$350 to introduce him to these other physicians and give him some special instructions, he was then president of Chicago University. That is questioned by the Government. It is for you to determine the weight that you will give to the conflicting evidence, if it be conflicting, upon that question. I mention this to you for the purpose of indicating that Mr. Schuch was permitted to testify that he could diagnose cancer because he had studied under specialists in the treatment of cancer. If you should find that he did not investigate this disease under men who were competent to instruct him in that respect, it would only go to affect the question as to whether or not he knows cancer when he sees and examines a case of cancer. He also testified that he studied chemistry under other specialists, and I do not recall that there is any contradiction of that. And he also says that he studied it on independent investigations made by himself.

Now witnesses have testified that they had cancer, or were treated for cancer, and were cured by the use of these remedies; they were permitted to say that because the defendant had already testified, qualifying himself in the particulars just referred to, that they had cancer; but if he were unable to determine whether or not they had

cancer, none of those witnesses testifying that they knew anything about cancer, there wouldn't be much left on which you could base a finding that any of these witnesses who testified that they had cancer and had been cured by the use of these remedies, did in fact have cancer. [7] And as against that, and to be considered along with it in determining whether or not these remedies have ever been used successfully in a case of cancer, we have the testimony of, I think, practically all of the witnesses offered by the Government, physicians and surgeons of many years practice, who say that the only possible way to diagnose cancer is with the microscope, which was not the way adopted, as I recall the testimony, in any of the cases treated by the defendant. And it has been questioned whether or not some of the cases which were claimed to have been treated by the defendant had cancer, and in the case of the witnesses who testified whether or not it was cancer at all. You will recall that counsel read extracts from the standard authorities defining cancer, and the kinds of cancer, and the instances in which a case may be properly considered a cancer or not a cancer at all. Witnesses for the Government also testified, some of them, if not all of them, that science has not yet disclosed a remedy for cancer unless it be the use of the knife. I believe the witness offered by the defendant, Dr. Smolenski, said that there was no known remedy. Therefore, gentlemen of the jury, if you find and believe from the testimony that these preparations were put into interstate commerce by shipment by express from Colorado to the District of Columbia, and that the one called Radio-Sulpho had on it the representation that it was a remedy for certain forms of cancer, which was false, and that it was not, and is not, a remedy or cure for any kind of cancer, then it will be your duty to find the defendant guilty, even if you find all of the other inscriptions on these packages were true representations as to the curative properties in controversy.

A further inscription was that it was a remedy for syphilis in any form. I do not recall any specific evidence that Radio-Sulpho would cure syphilis in any form; it may be that the defendant, in his testimony that these compounds had contents not disclosed by the analyses, which he did not describe to us, had certain elements which, in his belief, which in his knowledge, as he claims, so operated upon the system in a case of that disease that it would cure it; but it is for you to search your memories and determine whether or not there is any evidence in the case that Radio-Sulpho is a remedy for syphilis in any form. And if there be such evidence, then to consider with it the evidence offered by the Government, its witnesses testifying that there was nothing in either of these compounds, or in this Radio-Sulpho, that was a cure or remedy for syphilis in any form.

You understand, gentlemen of the jury, that the testimony of the physicians, such men as Dr. Freeman, and Dr. Hall and Dr. Bergtold, and perhaps one or two others, to the effect that these preparations were not cures for any of these diseases, was based upon the analyses made by Dr. Kimberly and Dr. Hill. These physicians, of course, have not analyzed these medicines; they are separate professions; they act, as they told you, upon the analyses furnished by the chemists, and having technical knowledge as to the effect of each drug and taking the analyses made by the chemists and each drug that they may see fit to use, they accept what he says about its contents,

and then apply their knowledge as to the effect of each element in the compound. So that, if you should find and believe from the testimony, beyond a reasonable doubt, that that is not a remedy for syphilis in any form, and that it was so represented upon this package, then that is a misbranding within the sense of the Food and Drugs Act, and the defendant is guilty, and you should so state in your verdict.

Congress, of course, has no power to control the use of these drugs and preparations, under this act, except when they become introduced into interstate commerce, that is, shipment from one State to another. The Constitution [8] of the United States vests Congress with the power to regulate interstate commerce, and in that manner it can reach the question; but if they are kept out of interstate commerce it is a matter purely for the several States. It can say, it has the power to say, under the Constitution, and it has said, that when drugs or foods are introduced into interstate commerce they shall be truly labeled so that the public will not be deceived—they must not be misbranded—that is what it did by this act.

This Radio-Sulpho, as already said, also is branded to the effect that it will dissolve and remove poisons absorbed into the skin of printers, painters, artists and metal-workers. It represents that it is a remedy for rheumatism, skin diseases, ulcers, running sores, uric acid and blood poison. We are not concerned, gentlemen of the jury, with any other kinds of patent medicines; we are not to determine the issues in this case, as to this defendant, in any sense by our prejudices in favor of or against patent medicines. We are to consider the facts in this case alone, and the law applicable to it, and decide it in accordance with the facts and the law in this case.

We pass to the second count. The first count is a charge as to the Radio-Sulpho, the second count as to the Radio-Sulpho Brew. The fore part of the inscription as to the Radio-Sulpho Brew is not as broad in its representations as that with reference to Radio-Sulpho. The fore part does not specifically claim that it is a remedy or cure for the diseases which I now mention, but says that it is a blood purifier and tonic for indigestion, constipation, catarrh, nervousness, bloating, turbid liver and kidney disorders, and is a laxative. The testimony shows that the Radio-Sulpho Brew, as I recall it, contains 5 per cent epsom salts, and I believe the testimony fairly indicates that epsom salts is a recognized remedy for constipation. I do not recall whether or not the testimony shows that it is used for indigestion or not, outside of the claim of the defendant that he used it for that purpose. But that same part of the inscription on that package then continues and says "and prevents appendicitis." I will not attempt to review, even in a general way, the testimony of the physicians who told us what science, as they understand it, has disclosed up to the present time about appendicitis, but leave it to you to determine, under all the facts in this case, whether or not Radio-Sulpho Brew will prevent appendicitis. If you find from the testimony, beyond a reasonable doubt, that it will not prevent appendicitis then that was a misbranding, in violation of the act, and you will find the defendant guilty on that count, otherwise he is not guilty as to that particular part of the inscription.

That package containing Radio-Sulpho Brew, as charged in the indictment, also contained this inscription, "This great Remedy is

Highly Beneficial for Sufferers with Asthma and Consumption, for it rids the System of all Obnoxious Substances." I believe we had one witness on the part of the defense who testified that he had had consumption in a very advanced stage, and took this Radio-Sulpho Brew and he believed he had been cured. We must recur again to the inquiry as to whether or not he had consumption, and if you so find, then the inquiry whether or not he has been cured; and then again the inquiry, even if he did have it and has been cured whether or not he was cured by the use of Radio-Sulpho Brew. If not, then there is but slight, if any, evidence, as I recall it, you may recall some, to the effect that Radio-Sulpho Brew will prevent consumption, not prevent it but is highly beneficial for consumption in any stage. The testimony on the part of the Government was to the effect that there was nothing in Radio-Sulpho Brew, according to the analyses made by Dr. Hill and Dr. Kimberly, that would be in any particular beneficial or helpful or at all affect the disease known as consumption. So that, if you [9] should find and believe from the testimony that this Radio-Sulpho Brew, as testified by Dr. Morgan, and I believe also so stated by the defendant, was shipped from Colorado by express to Dr. Morgan in the District of Columbia, thereby becoming an article of interstate commerce, and that one of the inscriptions on it was that it was a remedy highly beneficial for sufferers with consumption, and you should further find and believe from the evidence, beyond a reasonable doubt, that it was not highly beneficial for sufferers with consumption, then it was misbranded in that particular; although you might find that it was not misbranded in any other particular, yet if misbranded in this particular the defendant is guilty of having violated this Pure Food and Drugs Act in this shipment, and you must return a verdict of guilty.

This same part of the label, in this same sentence, also represents "This Great Remedy is Highly Beneficial for Sufferers with Asthma." You will recall and apply the testimony in the case as to the effect, if any, Radio-Sulpho Brew might have on asthma. Of course, gentlemen of the jury, as contended by the defendant's counsel, every honest man is hopeful that some remedy will be discovered for the cure of cancer, and perhaps it may not be of great weight in considering whether or not a remedy may be discovered to-day that one had not been discovered before to-day, but simply because a man says he has a remedy, and in his opinion it will cure, that he has tried it on cases that he thought were cancer and in his opinion it cured those cases, isn't any evidence that there are any such properties in that so-called remedy unless and until he has shown himself capable of diagnosing cancer, the remedy has been tried sufficiently to demonstrate that it effected the cure, and that the cure was not effected from some other cause.

The defendant declined to disclose other contents which he said could be found in these packages; he declined to tell us because, he said, it was a great secret that belonged to the Radio-Sulpho Company. I do not say to you that that is a sufficient reason why he should not have told you, I leave that to you. I can understand that from a financial point of view that would be a very powerful incentive for a man, where he knew that he had a remedy unknown to any one else, because in the case of any of these diseases it would necessarily afford a marvelous income. You must determine whether

or not that was a sufficient reason, and whether or not his mere word that there are other ingredients in it which he has failed to disclose, is such testimony as will convince you that there are other ingredients in it. He says that it takes him forty days to make the Radio-Sulpho and thirty days to make the Brew. According to the analyses of the chemists the contents are simple, the analysis was not difficult, and they apparently speak with confidence when they say that they found all there was in it, except they do say that there was a small amount of solids which they said were inert or inactive for anything.

You will be given, gentlemen of the jury, two forms of verdict on each count; one on the first count, which relates to the Radio-Sulpho alone, of guilty and one of not guilty. You will use one of those forms of verdict, and when you have agreed on your verdict on that count your foreman, whom you will select, will sign it. You will also be given two like forms of verdict on the second count, and your foreman will also sign your verdict on that count, and when you have reached a verdict on each count you will return them into court.

Mr. WARD. May it please your Honor, I would like to suggest that your Honor at this time instruct the jury as to the legal effect of the use by Dr. Morgan of the name Joy for use in getting this medicine.

The COURT. I think that is hardly necessary. Gentlemen of the jury, the district attorney asks that I call the attention of the jury to the fact that [10] the shipment of the two bottles of Radio-Sulpho and Radio-Sulpho Brew were obtained by Dr. Morgan under a false name; that, gentlemen of the jury, is utterly immaterial. Congress passed this law and it is the duty of the officers in every capacity, who have anything to do with the prosecution of crime or with the enforcement of the different acts of Congress, to use whatever means they think may be most successful in enforcing the act and suppressing what Congress intended should be suppressed; therefore the fact that Dr. Morgan wrote under an assumed name, the fact that he stated in his letters things that perhaps were not true, is not to be considered by the jury at all in arriving at a verdict. The sole question in the case is whether or not the defendant introduced these articles into interstate commerce, as charged, and whether or not they were misbranded, as provided in the Pure Food and Drugs Act; if he did he is guilty, if he did not he is not guilty.

UNITED STATES v. GEORGE SPRAUL & CO.

(Circuit Court of Appeals, Sixth Circuit, March 7, 1911.)

185 Fed. 405; N. J. Nos. 1044 and 1271; Circular No. 47, Office of the Solicitor.

The seizure of an article proceeded against under section 10 of the Food and Drugs Act, prior to the filing of the libel for condemnation and forfeiture, held unnecessary to give the court jurisdiction over such article.¹

In Error to the District Court of the United States for the Southern District of Ohio.

Libel against 275 cases of tomato catsup, more or less, claimed by George Spraul & Co. From a decree dismissing the libel for want

¹ United States v. 275 Cases of Tomato Catsup, p. 297, *ante*, reversed.

of an allegation of previous seizure, the United States brings error. Reversed.¹

Before KNAPPEN, Circuit Judge, and COCHRAN and SATER, District Judges.

KNAPPEN, *Circuit Judge*. The United States filed this libel in the United States District Court for the Southern District of Ohio [406]² under the Food and Drugs Act of June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1187), for the seizure and condemnation of the articles named in the above title.

Section 10 of the act referred to provides:

That any article of food, drug, or liquor, that is adulterated or misbranded within the meaning of this act, and is being transported from one State, Territory, District, or insular possession to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, or if it be sold or offered for sale in the District of Columbia, or the Territories, or insular possessions of the United States, or if it be imported from a foreign country for sale, or if it is intended for export to a foreign country, shall be liable to be proceeded against in any district court of the United States within the District where the same is found, and seized for confiscation by a process of libel for condemnation. * * * The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury on any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States.

The section in question contains provisions for the destruction or sale of the articles if condemned as adulterated or misbranded, as well as for the return of the same to the owner thereof upon the payment of the costs of the proceedings and the giving of a bond that the articles shall not be sold or disposed of contrary to the provisions of the act, or the laws of any State, Territory, district or insular possession.

The libel in question, referring to the articles of food as "contained in original unbroken packages," alleges that the said packages were transported in interstate commerce; that the same were illegally held within the jurisdiction of the court; and that the articles of food contained therein are adulterated in violation of the act referred to "and liable to seizure and condemnation as provided therein, for the reason that each and every bottle and jug in said two hundred and seventy-five, more or less, cases, contains an article of food and food product consisting wholly or in part of a filthy, decomposed and putrid vegetable substance and is unfit for food." It prayed "the process of attachment in due form of law, according to the course of this court in cases of admiralty and maritime jurisdiction, so far as is applicable to this case."

An attachment was issued to the marshal, commanding the seizure of the property, and notice to claimants. The marshal returned that he had seized the articles mentioned, and held the same in his custody subject to the further order of the court. The claimants named in the title appeared and demurred, "for the reason that it does not appear from an inspection of said libel that the catsup described therein had, prior to the filing of said libel and the issuance and service of process in this case, been seized in any way by any officer

¹ On October 18, 1911, a decree condemning and forfeiting the product for adulteration was entered by the district court.

² Numbers in brackets refer to pages of Federal Reporter.

of the United States." The libel contains no allegation of previous seizure. The court made an order sustaining the demurrer and dismissing the libel. The United States excepted to this order, and brings this writ of error to review the same.

The sole question presented here is whether previous executive seizure of the goods is necessary to give the court jurisdiction of the [407] libel, as was held by the district judge in an able and elaborate opinion.

In the case of *The Brig Ann*, 9 Cranch, 289, 3 L. Ed. 734, which was a case of an information against certain merchandise alleged to have been imported contrary to the nonimportation act of March 1, 1809, it was held that the court had no jurisdiction over the condemnation proceedings until after executive seizure. The statute which was involved in that case expressly provided for seizure by the collector and declared a forfeiture of the offending articles. Act March 1, 1909, c. 24, 2 Stat. at L. 528. Mr. Justice Story based the necessity of previous executive seizure upon the judiciary act of September 24, 1789 (c. 20, sec. 9, 1 Stat. 76), which conferred upon the district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on waters navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas." The learned justice interpreted this section of the judiciary act as conferring jurisdiction over the condemnation proceedings upon the district courts only of the district in which the seizure was made, saying that: "before judicial cognizance can attach upon a forfeiture in rem, under the statute, there must be a seizure; for until seizure, it is impossible to ascertain what is the competent forum." In a large number of cases since the decision in the case of *The Brig Ann*, it has been held that in proceedings in rem for forfeiture and confiscation previous executive seizure is necessary to jurisdiction, although there are cases not in harmony with this view. Among the cases in which such previous executive seizure has been held necessary to jurisdiction are the following: *Gelston v. Hoyt*, 3 Wheat. 246, 4 L. Ed. 381; *The Silver Spring*, Fed. Cas. No. 12,858; *The Washington*, Fed. Cas. No. 17,222; *The Fideliter*, Fed. Cas. No. 4,755; *The Tug May*, 6 Biss. 243, Fed. Cas. No. 9,330; *The Idaho* (D. C.), 29 Fed. 187, 191; *The Josefa Segunda*, 10 Wheat. 312, 6 L. Ed. 329; *Dobbin's Distillery v. United States*, 96 U. S. 395, 24 L. Ed. 637; *United States v. Larkin* (C. C. A. 6) 153 Fed. 113, 82 C. C. A. 247. The rule has also been extended to proceedings under laws providing for seizure and confiscation of "the property of rebels." *Pelham v. Rose*, 76 U. S., 103, 19 L. Ed. 602; *The Confiscation Cases*, 87 U. S. 92, 22 L. Ed. 320; *United States v. Winchester*, 99 U. S. 372, 25 L. Ed. 479. In all or nearly all of the cases above cited there is found either express statutory authority for the seizure, or express statutory declaration that the property shall be, or becomes, forfeited to the United States by reason of the acts complained of, and in some cases both such statutory authority and statutory declaration are found. The statute involved in the case of *The Silver Spring* expressly provided for a forfeiture of the boat "if found within the district," although not for an executive seizure. Act July 29, 1813, 3 Stat. 51, Sec. 6. In the

statute involved in *Gelston v. Hoyt*, express provision was made for seizure by the revenue officer whenever it should [408] appear that a breach of the laws of the United States had been committed whereby the ship or the goods on board might become liable to forfeiture. The act relating to navigation of steam vessels (Rev. Stat. Sec. 4499 [U. S. Comp. St. 1901, p. 3060]), as construed by District Judge Deady in the case of *The Idaho*, expressly authorizes a seizure by the proper officer of the Government in advance of judicial proceeding. The *Josefa Segunda* involved a statute providing that the property subject to confiscation was liable to be "seized, prosecuted and condemned, in the district where the said ship or vessel may be found or seized." *Dobbin's Distillery v. United States* arose under an internal revenue act which expressly provided for forfeiture. Act July 20, 1868, 15 Stat. 125, c. 186. The statute involved in *United States v. Larkin* arose under Revised Statutes, section 3072 (U. S. Comp. St. 1901, p. 2011), which makes it "the duty of the several officers of the customs to seize and secure any vessel or merchandise which shall become liable to seizure by virtue of any law respecting the revenue." In the act for the seizing and confiscating of property of rebels express provision is made for executive seizure. See *Pelham v. Rose*, *The Confiscation Cases*, and *United States v. Winchester*.

The present judiciary act (Rev. Stat. Sec. 563, sub-div. 8 [U. S. Comp. St. 1901, p. 457]) gives the district courts jurisdiction "of all civil causes of admiralty and maritime jurisdiction * * * and of all seizures on land and on waters not within admiralty and maritime jurisdiction," the subdivision mentioned thus omitting the provision found in the section of the judiciary act of 1789 to which we have referred, as to seizures "within their respective districts," and including cases of "seizures on land and on waters not within admiralty and maritime jurisdiction." In cases of seizures on land, however, the district court proceeds, not as a court of admiralty, but as a court of common law upon a trial by jury. *The Sarah*, 8 Wheat. 391, 5 L. Ed. 644; *United States v. Winchester*, 99 U. S. supra. In *Dobbin's Distillery v. United States*, Mr. Justice Clifford said: "Judicial proceedings in rem, to enforce a forfeiture, cannot in general be properly instituted until the property inculpatated is previously seized by executive authority, as it is the preliminary seizure of the property that brings the same within the reach of such legal process. *The Schooner Anne*, 9 Cranch, 289." In the *Dobbin's* case due executive seizure had in fact been made for breach of the internal revenue laws, and the above statement was clearly obiter.

Assuming for the purposes of this opinion that, in navigation, customs, and revenue cases, the right of executive seizure for violation of the statute exists, even without express statutory provision therefor, and that in such cases such seizure must precede judicial action for condemnation, the real and decisive question before us is simply what was the intention of Congress in this regard as expressed in the Food and Drugs Act. It is noticeable that the act nowhere declares the goods ipso facto forfeited by an infraction of the act. On the contrary, express provision is made for the redelivery of the goods to the owner, by order of the court, upon the payment of the costs and the giving of bond, even in cases where they are found to offend against the act. [409] The act provides that the Secretary of the Treasury,

the Secretary of Agriculture, and the Secretary of Commerce and Labor "shall make uniform rules and regulations for carrying out the provisions of this act, including the collection and examination of specimens of foods and drugs manufactured or offered for sale * * * or which may be submitted for examination by the chief health, food or drug officers of any State, Territory, or the District of Columbia * * *"; that the examination of such specimens shall be made in, or under the direction and supervision of, the Bureau of Chemistry of the Department of Agriculture for the purpose of determining whether such articles are adulterated or misbranded, and, in case such adulteration or misbranding appears, for the giving of notice by the Secretary of Agriculture "to the party from whom such sample was obtained," with opportunity to be heard. The act nowhere provides for executive seizure of property offending against the act. On the contrary, the only duty enjoined upon the Secretary of Agriculture (and upon him only) in case it shall appear to him that any of the provisions of the act have been violated is to "at once certify the facts to the proper United States District Attorney." (Sec. 4.) Not only is the district attorney given no power of seizure, but section 5 of the act expressly makes it his duty, on receiving from the Secretary of Agriculture (or certain other officers) report of a violation of the act, "to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the penalties as in such case herein provided," thus suggesting by implication the exclusion of right of executive seizure. Nor has the marshal implied power to make executive seizures under the act. He is not by statute charged with the enforcement of the act, as are revenue and customs officers with respect to laws relating to those subjects.

We are not concerned with the question whether the proceedings and notice provided by sections 3, 4, and 5 of the act are necessary prerequisites to action by the district attorney, nor whether they apply to a proceeding under section 10 of the act. (See *United States v. 50 Barrels of Whiskey* (D. C.), 165 Fed. 966; *United States v. 65 Casks of Liquid Extracts* (D. C.), 170 Fed. 449.) We call attention to these provisions because they are the only ones expressly relating to proceedings for the enforcement of the penalties provided by the act, as distinguished from criminal prosecutions. The considerations to which we have adverted seem to us to repel, rather than sustain, an inference that an executive seizure is necessary, or even contemplated, previous to judicial proceedings in condemnation. In the case of a law of this character, while it would not be unnatural to provide for an executive seizure, and while such power of seizure would seem of advantage in the enforcement of the act, on the other hand, if authority to make such seizure was intended, it would be the natural course to expressly so declare. There is no express declaration to that effect and none by implication, unless contained in the clause of section 10, providing that the offending articles "shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of [410] libel for condemnation," or in the provision that "The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty. * * *" It is clear that, as the former clause is punctuated, there is no necessary implication of previous executive

seizure. According to the punctuation, the seizure for confiscation would seem to be "by a process of libel"; and although such punctuation is by no means conclusive, and should not be controlling as against the intent of the act as otherwise shown, it is entitled to consideration.

It is urged that the clause "the proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty," refers to the practice under Admiralty Rule 22, which provides that "the information and libels of information upon seizures for any breach of the revenue, or navigation, or other laws of the United States, shall state the place of seizure * * * and the district within which the property is brought and where it then is." But, while this rule recognizes the practice of informations and libels upon seizures, it is not declaratory of the necessity of such previous executive seizure. There is in our opinion nothing in the reference to "proceedings in admiralty" contained in section 10 of the Food and Drugs Act which adopts rule 22 rather than rule 23, which latter rule applies to "all libels in instance cases, civil or maritime," and which provides that the libel shall state "if the libel be in rem, that the property is within the district." Under rule 23 jurisdiction is obtained by the presence of the property within the district (Henry on Admiralty, sec. 127, 132; *The Rio Grande*, 23 Wall. 458, 23 L. Ed. 158), and the court acquires its jurisdiction over the libel by its filing, and over the res by seizure of the same under a process issued after the libel is filed. (*The Queen of the Pacific* [D. C.] 61 Fed. 213; *Pacific Coast S. S. Co. v. Bancroft-Whitney Co.* [C. C. A. 9] 94 Fed. 180, 36 C. C. A. 135.)

The proceeding before us was not in admiralty. The Food and Drugs Act merely provides for conformity of all proceedings for confiscation thereunder "as near as may be, to the proceedings in admiralty." Previous executive seizure is no part of admiralty proceedings. The language in question, to our minds, falls far short of declaring by necessary implication that a condition precedent to jurisdiction in case of forfeitures under the laws relating to impost, navigation or trade, viz, an executive seizure, is necessary to jurisdiction over judicial proceedings in confiscation under the Food and Drugs Act. Nor is there anything in the language of the present judiciary act which limits jurisdiction over condemnation proceedings in rem to the district where the property has been previously seized.

Taking into account the nature of the act and the various considerations to which we have referred, as well as the embarrassment which might well result from an executive seizure whose validity must depend not only upon the determination by the court of the question of fact of misbranding or adulteration, but also upon the existence of the other facts necessary to bring the articles under the Federal statutes, we are of opinion that the act should not be construed as making a previous executive seizure necessary to the jurisdiction of the court [411] over proceedings for confiscation. We are the better content with this conclusion from the fact that it has been the general, if not the universal, practice, under this act, for seizures to be made on warrant issued after the filing of the libel.

In our opinion the order sustaining the demurrer should be reversed.

HIPOLITE EGG CO. v. UNITED STATES.

(United States Supreme Court, March 13, 1911.)

220 U. S. 45; N. J. No. 1043; Circular No. 45, Office of the Solicitor.

The provisions of section 10 of the Food and Drugs Act, providing for the seizure of adulterated and misbranded foods and drugs apply not only to articles *for sale* but also to articles to be used as raw material in the manufacture of some other product.

In Error to and appeal from the District Court of the United State for the Southern District of Illinois. Affirmed.¹

The facts are stated in the opinion.

[49]² Mr. Justice McKENNA delivered the opinion of the court.

The case is here on a question of jurisdiction certified by the district court.

On March 11, 1909, the United States instituted libel proceedings under section 10 of the act of Congress of June 30, 1906, [50] c. 3515, 34 Stat. L. 768, against fifty cans of preserved whole eggs, which had been prepared by the Hipolite Egg Company of St. Louis, Missouri.

The eggs, before the shipment alleged in the libel, were stored in a warehouse in St. Louis for about five months, during which time they were the property of Thomas & Clark, an Illinois corporation engaged in the bakery business at Peoria, Ill.

Thomas & Clark procured the shipment of the eggs to themselves at Peoria, and upon the receipt of them placed the shipment in their storeroom in their bakery factory along with other bakery supplies. The eggs were intended for baking purposes, and were not intended for sale in the original, unbroken packages or otherwise, and were not so sold. The Hipolite Egg Company appeared as claimant of the eggs, intervened, filed an answer, and defended the case, but did not enter into a stipulation to pay costs.

Upon the close of libellant's evidence, and again at the close of the case, counsel for the egg company moved the court to dismiss the libel on the ground that it appeared from the evidence that the court, as a Federal court, had no jurisdiction to proceed against or confiscate the eggs, because they were not shipped in interstate commerce for sale within the meaning of section 10 of the Food and Drugs Act, and for the further reason that the evidence showed that the shipment had passed out of interstate commerce before the seizure of the eggs, because it appeared that they had been delivered to Thomas & Clark and were not intended to be sold by them in the original packages or otherwise.

The motions were overruled and the court proceeded to hear and determine the cause and entered a decree finding the eggs adulterated, and confiscating them. Costs were assessed against the egg company.

The decree was excepted to on the ground that the [51] court was without jurisdiction *in rem* over the subject matter, and on the further ground that the court was without jurisdiction to enter judgment, *in personam* against the egg company for costs.

The jurisdiction of the district court being challenged, the case comes here directly.

¹ Affirming *United States v. 50 Cans Preserved Whole Eggs*, p. 227, *ante*.

² Numbers in brackets refer to pages of U. S. Reports.

Section 2 of the Food and Drugs Act prohibits the introduction into any State or Territory from any other State or Territory of any article of food or drugs which is adulterated, and makes it a misdemeanor for any person to ship or deliver for shipment such adulterated article, or who shall receive such shipment, or, having received it, shall deliver it in original unbroken packages for pay or otherwise.

In giving a remedy section 10 provides that if "any article of food that is adulterated and is being transported from one State * * * to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, * * * shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. * * * The proceeding of such libel cases shall conform, as near as may be, to the proceedings in admiralty * * * and all such proceedings shall be at the suit of and in the name of the United States."

The shipment to Thomas & Clark consisted of 130 separate cans, each can corked and sealed with wax. The eggs were intended to be used for baking purposes. The only can sold was that sold to the inspector for the purpose of having the eggs analyzed. They contained approximately two per cent of boric acid, which the court found was a deleterious ingredient, and adjudged that they were adulterated within the meaning of the food and drugs act of June 30, 1906, c. 3915, 34 Stat. 771.

The egg company, whilst not contending that the [52] shipment of the eggs was not a violation of section 2 of the act, and a misdemeanor within its terms, and not denying the power of Congress to enact it, presents three contentions: (1) Section 10 of the Food and Drugs Act does not apply to an article of food which has not been shipped for sale, but which has been shipped solely for use as raw material in the manufacture of some other product. (2) A United States district court has no jurisdiction to proceed *in rem* under section 10 against goods that have passed out of interstate commerce before the proceedings *in rem* were commenced. (3) The court had no jurisdiction to enter a personal judgment against the egg company for costs.

It may be said at the outset of these contentions that they insist that the remedies provided by the statute are not coextensive with its prohibitions, and hence that it has virtually defined the wrong and provided no adequate means of punishing the wrong when committed. Premising this much, we proceed to their consideration in the order in which they have been presented. The following cases are cited to sustain the first contention: *United States v. 65 Casks of Liquid Extracts*, 170 Fed. 449, affirmed by the Circuit Court of Appeals in *United States v. Knowlton Danderine Company*, 175 Fed. 1022, and *United States v. 46 Packages and Boxes of Sugar*, in the District Court for the Southern District of Ohio, not yet reported.¹

The articles involved in the first case were charged with having been misbranded and consisted of drugs in casks, which were shipped from Detroit, Michigan, to Wheeling, West Virginia, there to be

¹ 183 Fed. 642; N. J. No. 723; p. 324, *ante*.

received by the Knowlton Danderine Company in bulk in carload lots and manufactured into danderine, of which no sale was to be made until the casks should be emptied and the contents placed in properly marked bottles.

It was contended that the articles, not having been shipped in the casks for the purpose of sale thus in bulk, [53] but shipped to the owner from one State to another for the purpose of being bottled into small packages suitable for sale, and when so bottled to be labeled in compliance with the requirements of the act, were not transported for sale, and were therefore not subject to libel under section 10 of the act.

The contention submitted to the court the construction of the statute. The court, however, based its decision upon the want of power in Congress to prohibit one from manufacturing a product in a State and removing it to another State "for the purpose of personal use and not sale, or for use in connection with the manufacture of other articles, to be legally branded when so manufactured;" and concluded independently, or as construing the statute, that the danderine company, being the owner of the property, shipped it to itself and did not come within any of the prohibitions of the statute. The case was affirmed by the Circuit Court of Appeals, 175 Fed. 1022. The court, however, expressed no opinion as to the power of Congress. It decided that the facts did not exhibit a case within the purpose of the statute, saying: "No attempt to evade the law, either directly or indirectly or by subterfuges, has been shown, it appearing that the manufacturer had simply transferred from one point to another the product he was manufacturing for the purpose of completing the preparation of the same for the market. Under the circumstances disclosed in this case, having in mind the object of the Congress in enacting the law involved, we do not think the liquid extracts proceeded against should be forfeited. In reaching this conclusion we do not find it necessary to consider other questions discussed by counsel and referred to in the opinion of the court."

In *United States v. 46 Packages and Boxes of Sugar* the court construed the statute as applying only to transportation for the purpose of sale. To explain its view the court said: "Following the words 'having been [54] transported' is an ellipse, an omission of words necessary to the complete construction of the sentence. These words are found in the preceding part of the section and, when supplied, the clause under which this libel is filed reads and means, 'any article of food, drug or liquor that is adulterated or misbranded within the meaning of this act, having been transported from one State to another *for sale* [*italics ours*], remains unloaded, unsold, or in original, unbroken packages, * * * shall be liable,'" etc. And the court was of opinion that this view was in accord with the other two cases which we have cited. This may be disputed. It may well be considered that there is no analogy between an article in the hands of its owner or moved from one place to another by him, to be used in the manufacture of articles subject to the statute and to be branded in compliance with it, and an adulterated article *itself* the subject of sale and intended to be used as adulterated in contravention of the purpose of the statute.

A legal analogy might be insisted upon if cakes and cookies, which are the compounds of eggs and flour which the record presents, could be branded to apprise of their ingredients like compounds of alcohol. The object of the law is to keep adulterated articles out of the channels of interstate commerce, or, if they enter such commerce, to condemn them while being transported or when they have reached their destination, provided they remain unloaded, unsold or in original unbroken packages. These situations are clearly separate, and we cannot unite or qualify them by the purpose of the owner to be a sale. It, indeed, may be asked in what manner a sale? The question suggests that we might accept the condition, and yet the instances of this record be within the statute. All articles, compound or single, not intended for consumption by the producer, are designed for sale, and, because they are, it is the concern of the law to have them pure.

It is, however, insisted that "the proceeding *in personam* [55] authorized by the law was intended to be, and no doubt is, capable of giving full force and effect to the law"; and, further, that a producer in a State is not interested in an article shipped from another State which is not intended to be sold or offered for consumption until it is manufactured into something else. The argument is peculiar. It is certainly to the interest of a producer or consumer that the article which he receives, no matter whence it come, shall be pure, and the law seeks to secure that interest, not only through personal penalties but through the condemnation of the article if impure. There is nothing inconsistent in the remedies, nor are they dependent. The *Three Friends*, 166 U. S. 1, 49.

The first contention of the egg company is, therefore, untenable.

2. Under this contention it is said that "the jurisdiction of the Food and Drugs Act in question can go no farther than the power given to Congress under which it was enacted," and that the district court, therefore, "had no jurisdiction *in rem* because at the time of the seizure the eggs had passed into the general mass of property in the State and out of the field covered by interstate commerce."

To support the contention, *Waring v. The Mayor*, 8 Wall. 110, is cited. That case involved the legality of a tax imposed by an ordinance of the city of Mobile upon merchants and traders of the city equal to one-half of one per cent on the gross amount of their sales, whether the merchandise was sold at public or private sale. *Waring* was fined for non-payment of the tax, and he brought suit to restrain the collection of the fine, alleging that he was exempt from the tax on the ground that the sales made by him were of merchandise in the original packages, as imported from a foreign country, and which was purchased by him, in entire cargoes, of the consignees of the importing vessels before their arrival, or while the vessels were [56] in the lower harbor of the port. He obtained a decree in the trial court which was reversed by the supreme court of the State of Alabama. A writ of error was sued out from this court and the decree was affirmed, on the ground that *Waring* was not the shipper or consignee of the imported merchandise, nor the first vendor of it, and it was the settled law of the court "that merchandise in the original packages once sold by the importer is taxable as other property," citing *Brown v. Maryland*, 12 Wheat. 443; *Almy v. California*, 24

How. 173; *Pervear v. Commonwealth*, 5 Wall. 479. This also was said:

When the importer sells the imported articles, or otherwise mixes them with the general property of the State by breaking up the packages, the state of things changes, as was said by this court in the leading case, as the tax then finds the articles already incorporated with the mass of property by the act of the importer. Importers selling the imported articles in the original packages are shielded from any such State tax, but the privilege of exemption is not extended to the purchaser, as the merchandise, by the sale and delivery, loses its distinctive character as an import.

This case is clear as far as it goes, but the facts are not the same as those in the case at bar.

In the case at bar there was no sale of the articles after they were committed to interstate commerce, nor were the original packages broken. Indeed, it might be insisted that we need go no farther than that case for the rule of decision in this. It affirms the doctrine of original packages which was expressed and illustrated in previous cases and has been expressed and illustrated in subsequent ones. It is too firmly fixed to need or even to justify further discussion, and we shall not stop to affirm or deny its application to the special contention of the egg company. We prefer to decide the case on another ground which is sustained by well-known principles.

[57] The statute declares that it is one "for preventing * * * the transportation of adulterated * * * foods * * * and for regulating traffic therein;" and, as we have seen, section 2 makes the shipper of them criminal and section 10 subjects them to confiscation, and, in some cases, to destruction, so careful is the statute to prevent a defeat of its purpose. In other words, transportation in interstate commerce is forbidden to them, and, in a sense, they are made culpable as well as their shipper. It is clearly the purpose of the statute that they shall not be stealthily put into interstate commerce and be stealthily taken out again upon arriving at their destination and be given asylum in the mass of property of the State. Certainly not, when they are yet in the condition in which they were transported to the State, or, to use the words of the statute, while they remain "in the original, unbroken packages." In that condition they carry their own identification as contraband of law. Whether they might be pursued beyond the original package we are not called upon to say. That far the statute pursues them, and, we think, legally pursues them, and to demonstrate this but little discussion is necessary.

The statute rests, of course, upon the power of Congress to regulate interstate commerce, and, defining that power, we have said that no trade can be carried on between the States to which it does not extend, and have further said that it is complete in itself, subject to no limitations except those found in the Constitution. We are dealing, it must be remembered, with illicit articles—articles which the law seeks to keep out of commerce, because they are debased by adulteration, and which law punishes them (if we may so express ourselves) and the shipper of them. There is no denial that such is the purpose of the law, and the only limitation of the power to execute such purpose which is urged is that the articles must be apprehended in transit or before they have become a part [58] of the general mass of property of the State. In other words, the contention attempts to apply to articles of illegitimate commerce the rule which marks

the line between the exercise of Federal power and State power over articles of legitimate commerce. The contention misses the question in the case. There is here no conflict of National and State jurisdictions over property legally articles of trade. The question here is whether articles which are outlaws of commerce may be seized wherever found, and it certainly will not be contended that they are outside of the jurisdiction of the National Government when they are within the borders of a State. The question in the case, therefore, is, What power has Congress over such articles? Can they escape the consequences of their illegal transportation by being mingled at the place of destination with other property? To give them such immunity would defeat, in many cases, the provision for their confiscation, and their confiscation or destruction is the special concern of the law. The power to do so is certainly appropriate to the right to bar them from interstate commerce, and completes its purpose, which is not to prevent merely the physical movement of adulterated articles, but the use of them, or rather to prevent trade in them between the States by denying to them the facilities of interstate commerce. And appropriate means to that end, which we have seen is legitimate, are the seizure and condemnation of the articles at their point of destination in the original, unbroken packages. The selection of such means is certainly within that breadth of discretion which we have said Congress possesses in the execution of the powers conferred upon it by the Constitution. *McCulloch v. Maryland*, 4 Wheat. 316; *Lottery Case*, 188 U. S. 321, 355.

3. Had the court jurisdiction to adjudge costs against the egg company? This is contended, and in support of the contention the claimant assimilates this proceeding [59] to one in admiralty. In consequence, it may be supposed of the provisions of section 10 of the Food and Drugs Act that the proceedings "shall conform, as near as may be, to the proceedings in admiralty," and *The Monte A*, 12 Fed. 331, and *The Alida*, 12 Fed. 343, are cited as deciding that in a proceeding *in rem* the court has no jurisdiction to assess the costs *in personam* against the claimant, who simply files an answer, but who does not enter into a stipulation to pay the costs of the proceeding. Too broad a deduction is made from these cases. They undoubtedly decide that a process *in rem* and *in personam* cannot be joined in admiralty in the same libel, but it was not held that this was because of a want of jurisdictional power in the court. Such view was disclaimed in *The Monte A*, and to show that the framing of a libel against the owner *in personam* and against the vessel *in rem* was not jurisdictional, the court said that a breach of a contract of affreightment could have been so framed "long before the adoption of the Supreme Court rules in admiralty."

It is stated in Benedict's Admiralty, section 204, that "the distinction between proceedings *in rem* and *in personam* has no proper relation to the question of jurisdiction." It may be, as stated in section 359 of the same work, that "in a suit *in rem*, unless some one intervenes, the power and process of the court is confined to the thing itself and does not reach either the person or property of the owner." If, however, the owner comes in, or an intervenor does, his appearance is voluntary. He becomes an actor and subjects himself to costs, and this even if his ownership be averred in the libel. *Waple Pro-*

ceedings In Rem., page 100, sec. 73; *United States v. 422 Casks of Wine*, 1 Pet. 547.

And such seems to be the necessary effect of Admiralty Rules 26¹ and 34.¹ It is provided (Rule 34) that if a third [60] person intervene, for his own interest, he is required to give a stipulation with sureties to abide the final decree rendered in the original or appellate court. It is in effect conceded that if such a stipulation be given, a judgment for costs can be rendered. But, upon what theory? The concession confounds the relation between the stipulation and the judgment, and makes the security for the payment of the judgment the source of jurisdiction to render it—jurisdiction according to the contention, which the court does not have as a Federal court.

Even, therefore, upon the supposition that the principles of the admiralty law are to apply to the proceedings under section 10, we think the court had jurisdiction to render a judgment for costs against the egg company.

So far our discussion has been in deference to the contention of the egg company, but it is disputable if the certificate presents a question of jurisdiction as to costs. The district court gets its jurisdiction of the cause from section 10 of the Food and Drugs Act, and whether the libel may be *in rem* and *in personam*, or whether a personal judgment for costs can be rendered, may be said to be simply a question of the construction of the section, and not one which involves the jurisdiction of the court. In other words, the rulings of the court may be error only, not in excess of its power. It certainly had jurisdiction of the person of the egg company.

Decree affirmed.

UNITED STATES v. LEHN & FINK.

(Circuit Court S. D. New York, March 17, 1911.)

Circular No. 49, Office of the Solicitor.

The Food and Drugs Act is not unconstitutional in that it contains in section 7, par. 1, in the case of drugs, a delegation of legislative power.

Information charging violation of Section 2, Food and Drugs Act. On demurrer to the information. Overruled. Information dismissed on motion of the attorney for the United States.

OPINION OF THE COURT.

HOUGH, *District Judge*. [1] The demurrer admits that defendants shipped from one State to another an article called jalap. The third count alleges that this [2] jalap (being a drug) was "adulterated, in that it was sold under and by a name recognized in the United States Pharmacopœia or National Formulary, and it differs from the standard of strength, quality and purity as determined by the test laid down in (said Pharmacopœia) *official at the time of investigation*."

The fourth count alleges that the same jalap "was misbranded in that (the) label (upon its container) would indicate that said product

¹ For these Rules in full see 210 U. S. 552, 554.

contains 12.81 per cent resin soluble in ether, whereas in truth and in fact said drug contains 0.82 per cent resin soluble in ether and only 5.21 total resin.

Three questions of law are raised by the demurrers:

1st. That so much of the act as is necessary to support the counts mentioned is unconstitutional as being *ex post facto*.

2d. That the same portion of the act is unconstitutional as containing an improper delegation of legislative authority.

3d. That the fourth count is defective in that it does not state that said alleged misbranding was false *and* misleading, which is said to be the proper reading of the words "false *or* misleading" in section 8 of the act.

The argument which seeks to condemn (partially at all events) the act as *ex post facto* legislation is this: The information is for shipping an adulterated drug, and section 7 of the statute declares that for the purpose of the act a drug is deemed adulterated when "sold under or by a name recognized in the United States Pharmacopœia (and differing) from the standard of strength, quality or purity as determined by the test laid down in (said) Pharmacopœia * * * *official at the time of investigation.*"

The book called a Pharmacopœia changes from time to time; its tests may be one thing to-day and another a month hence. Therefore a man may ship a drug which answers the statutory test at the time of shipment, and yet a month or so later when an investigation into the matter is had, it may be found that owing to a change in the book, the same unchanged drug has become adulterated; thus converting a shipment innocent when made, into a criminal offence.

If this be the proper statutory construction, such legislation is plainly *ex post facto* as subjecting the citizen to punishment for something which when accomplished was obnoxious to no statute.

Admittedly it is the duty of this court to uphold the constitutionality of any congressional provision if it can possibly be done with reason; even if it be not the duty of all trial courts to leave such constitutional questions to the higher tribunals—as has so often been said. In this instance defendant's argument rests upon the assumption that that which constitutes the crime is the state of facts found when an investigation is had, and upon the further assumption that [3] the "investigation" mentioned in section 7 of the act is identical with the "examination" referred to in sections 3, 4 and 11 of the same statute.

It seems to me that neither of these assumptions is necessary, and if they are not necessary then the act is not open to the objection of being *ex post facto*.

If by "time of investigation" (under section 7) be meant the time of "examination" made by the Department of Agriculture (under section 4) it does not follow that the crime is *then committed*. It may be that months after shipment, a drug is to be deemed adulterated under the conjoint effect of section 7 of the act, plus a recent amendment to the Pharmacopœia—but it is not true that the act declares the mere existence of such adulteration to be an offence. The offence is stated and completely defined (so far as this case is concerned) in section 2 of the act and (applying the statute to the facts here) it is there said that "any person who shall ship * * * from any

State * * * to any other State * * * any * * * drugs * * * adulterated or misbranded within the meaning of this act" shall be guilty of a misdemeanor. The offender is guilty by the act of shipment, for the whole statute depends for validity upon the commerce clause of the Constitution. If he is not guilty when the shipment takes place and by reason of the shipment he is not guilty at all. If the statute be construed to convert a shipment lawful when made into an illegality after the shipment is accomplished, it is not only *ex post facto* but without any warrant as a regulation of commerce. It may well be, therefore, that when any given drug is found to be adulterated within the meaning of section 7 by reason of a recent change in the Pharmacopœia, that it "shall be deemed to be adulterated," but it can only be deemed to be adulterated either by common sense or by the very language of the act in the future tense. Any further shipment of that drug may instantly subject shipper and receiver to the penalties of the act, but the provision in question cannot apply to an already accomplished shipment made at a time when the drug did comply with the Pharmacopœia for the time being.

Also it is not necessary to identify the word "investigation" in section 7 with the word "examination" in other sections. Investigation is much the wider word; it includes not only an examination into the nature of the article shipped, but into all the circumstances of shipment. The examination of the drug itself is but a part of the investigation which must necessarily be held, to ascertain the matters necessary to the formulation and proof of an information or indictment.

It is therefore held that the act is not open to the objection of being *ex post facto*, and it follows from such holding that no conviction can be had thereunder, unless it is shown by competent evidence that [4] (in this instance) the drug when shipped was adulterated within the meaning of the act.

The contention that the act is void as an unconstitutional delegation of legislative authority rests upon a somewhat different basis. It is pointed out, and truly, that the act contemplates changes from time to time in the Pharmacopœia, and declares as of the date of its passage in 1906 that (for example) that may be a crime in 1916 which was not a crime when the statute became law, because of an intervening change in the "test laid down in the United States Pharmacopœia."

On this point the decision in *Ohio v. Emery*, 55 Ohio St., 364, is interesting and instructive. There the legislature of that State had passed a pure food and drug act which almost in the language of the national statute defined adulteration as a departure from standard of the United States Pharmacopœia. But it did not provide for any future changes in the Pharmacopœia itself. Quite naturally the court in the case cited held that reference must be had solely to the book in existence at the time of the passage of the statute; so that the question here is whether Congress can do that which the legislature of Ohio omitted to do.

From the multitude of decisions on the subject of delegation of legislative authority it seems to me necessary to make very few citations:

The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which

the law makes or intends to make its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power and must therefore be a subject of inquiry and determination outside of the halls of legislation. *Locke's Appeal*, 72 Pa. at 498, cited with approval in *Union Bridge Co. v. United States*, 204 U. S., at 383.

The Federal decision cited reviews the whole matter. That also was a case of criminal information, and in my judgment is controlling authority here. A comparison also of the much relied upon decision in *United States v. Eaton*, 144 U. S. 677, with *Matter of Kollock*, 165 U. S. 526, is instructive.

To me there could not be a plainer instance than this act of the legislature's having made a complete and perfect criminal statute, not dependent at the time of its passage on the act of any other power or person and of them providing for changes in the meaning of the word "adulterated"; a word which in the nature of things may and should change its signification with advancing knowledge or increasing civilization.

[5] It is just as true that the meaning of "adulterated" in 1906 may be unsuitable to 1916, as that the phrase "unreasonable obstruction to free navigation" should have had a meaning as applied to the Monongahela and Allegheny Rivers in 1874, different from that found proper in 1902. And it is just as reasonable and lawful for the pure food statute to operate on the meaning of the word "adulterated" as given from time to time by experts in chemistry and hygiene, as it was held to be for the meaning of "unreasonable obstruction to navigation" to depend for its signification upon the opinion of the Secretary of War for the time being when fortified by the opinions of the engineers of his department.

As to the third contention, I do not find either the word "false" or the word "misleading" used in the fourth count of the information, but am of the opinion that the two words as used in section 8 of the act are of the same import and one or the other or both may be indifferently used. The appropriate meaning of the word "false" as extracted from the dictionary is "adapted or intended to mislead," and the word "misleading" means "tending to lead astray, deceptive." I perceive no difference in these significations for the purpose of the statute in question.

The demurrers are therefore overruled; but it may be added that it seems to me from a comparison of the counts with the *Pharmacopœia*, that the jalap label of which the Government here complains is a grotesque mistake, something flowing from a printer's error or the ignorance of an unskilled chemist. The proportion of resin soluble in ether stated in the label, is so enormous and impossible, as to deceive no one to whom the label would mean anything, and such puerile errors ought never to have been made the subject of criminal procedure. A charge based on this kind of mistake is well calculated to bring into disrepute those weapons of the law which ought to be reserved for intentional wrongdoers.

UNITED STATES v. TWO BARRELS OF DESICCATED EGGS.

(District Court, D. Minnesota, Fourth Division, March 20, 1911.)

185 Fed. 302; Circular No. 51, Office of the Solicitor.

Held that executive seizure prior to the filing of a libel for condemnation and forfeiture under section 10 of the Food and Drugs Act is not necessary to confer jurisdiction in the district courts.¹ In view of the decision of the Supreme Court in *Hipolite Egg Co. v. United States*, it is unnecessary to allege in libels for condemnation under the Food and Drugs Act that articles of food have been transported *for sale*.

Libel under section 10 of the Food and Drugs Act. On exceptions filed by Armour & Co., claimants. Exceptions overruled.

[304]² WILLARD, *District Judge*. This is a proceeding under section 10 of the Food and Drugs Act of June 30, 1906 (Act June 30, 1906, c. 3915, 34 Stat. 771 [U. S. Comp. St. Supp. 1909, p. 1193]). Armour & Co. appeared as claimant of the property, and has filed exceptions to the libel.

1. The first exception is as follows:

That it appears upon the face of said libel that at the time of the filing thereof no seizure of the property therein described had been made by the libelant, and that this court has, therefore, no jurisdiction over said property.

The claimant says that for the last 100 years it has been the rule in admiralty that in seizure cases the jurisdiction depended upon the fact that a seizure had been made before the libel was filed, and that, no prior seizure having been made in this case, the court has no jurisdiction.

It may be said, in the first place, that this is not a case of admiralty or maritime jurisdiction. The jurisdiction of the district court is conferred by the act itself. The only connection that the proceeding has with admiralty is due to the fact that section 10 provides that the proceedings in such cases shall conform as near as may be to proceedings in admiralty. Section 7 of the confiscation act of July 17, 1862, c. 195, 12 Stat. 589, contained a similar provision; it being there stated that the "proceedings shall conform as nearly as may be to proceedings in admiralty or revenue cases." It was said, however, in *The Confiscation Cases*, 20 Wall. 92, at page 110, 19 L. Ed. 196, that:

Strict conformity is not required. No doubt in cases of seizure upon land resort should be had to the common-law side of the court, and such, in substance, was, we think, the case here.

But, admitting that in cases of this kind the procedure in admiralty requires a prior seizure, it is, of course, unquestioned that Congress could change such procedure, and provide that the libel should be first filed, and then a warrant issued for the arrest of the property, making the proceeding in that respect similar to a proceeding in rem in admiralty between private persons. The only question therefore is, What in this respect does the act itself provide? If there is to be a seizure prior to any proceeding in court, there must be some pro-

¹ See also *United States v. George Spraul & Co.*, p. 372, *ante*.

² Numbers in brackets refer to pages of Federal Reporter.

vision, either in this act or in some other act, authorizing some one to make such seizure. There is nothing in the law which authorizes any one, either a private person or a public officer, to do so. By section 4 the Secretary of Agriculture is authorized to make investigations, and, if he finds that any provision of the act has been violated, he is required to certify the facts to the United States district attorney, but there is nothing here which gives him or any agent power to seize the property. Section 5 requires the district attorney, upon being informed that the act has been violated, to cause appropriate proceedings to be commenced in the proper court. This does not authorize him or the marshal or any other person to seize the property before such proceedings are commenced in court. No other law has been referred to by counsel authorizing any officer to make the seizure provided for by this act prior to a proceeding in court. It is true that in *Gelston v. Hoyt*, 3 Wheat. 246, 4 L. Ed. 381, Mr. Justice Story, delivering the opinion of the [305] court, said, on page 308, "at common law, any person may, at his peril, seize for a forfeiture to the Government"; but he added:

In the absence of all positive authority, it might be proper to resort to these principles in aid of the manifest purposes of the law. But there are express statutable provisions, which directly apply to the present case.

It appeared there that the seizure was made by the collector and surveyor of the port of New York, who it was held by the court were expressly authorized to make a seizure by the act of February 18, 1793. The same justice delivering the opinion of the court in *The Josefa Segunda*, 10 Wheat. 312, said on page 329, 6 L. Ed. 329:

Under this clause, standing alone, it cannot be doubted that any person might lawfully seize such a vessel at his peril.

But it was distinctly held that the collection act of 1799, c. 128, sec. 70, made it the duty of customhouse officers to make seizures of all vessels violating the revenue laws, and the seizure was in fact made by the collector of the port of New Orleans. A fair construction of the Food and Drugs Act does not require a holding that the seizure mentioned therein can be made by a private person. Such a provision would seem to be contrary to the general policy of the law in seizure cases. As is seen hereafter, in almost all of them, specific statutory provisions have authorized determined persons to make such seizures. To allow a private person to enter upon the premises of another, without any warrant or authority of law whatever, and to search and to seize any property which he might think was subject to confiscation, even though he did so at his peril, might lead to breaches of the peace and the disturbance of the public order. Whether the common law which allowed such a proceeding would be consistent with our constitutional provisions relating to seizures and searches presents a question of some difficulty. It cannot be held that the act in question intended to allow such a proceeding. There is nothing therefore in the law which authorizes any private person or public officer to make the seizure prior to the commencement of some proceeding in court.

An examination of the cases decided by the Supreme Court, and cited by the claimant, shows that in each one of them there was some specific provision in the law authorizing the person who did make the seizure to so make it prior to the filing of the libel. The case principally relied upon in support of the exception is the *Brig Ann*, 9

Cranch, 289, 3 L. Ed. 734. In that case the intercourse act of March 1, 1809, c. 24, 2 Stat. 528, under which the seizure was made, expressly authorized in section 8 every collector, naval officer, surveyor, or other officer of the customs to seize any property imported contrary to law; and the merchandise in question in that case was in fact seized by a revenue cutter. In the *Josefa Segunda*, above cited, the ship was seized for a violation of the act of March 3, 1807, c. 22, 2 Stat. 426, relating to the slave trade. Section 7 of that act authorized the President of the United States to direct the commanders of armed vessels of the United States to seize and bring into ports of the United States any such vessels. In *Clifton v. United States*, 4 How. 242, 11 L. Ed. 957, goods imported into New York and transferred to Philadelphia were seized by the customs officers there, under a claim of forfeiture by reason of [306] undervaluation. That seizure was expressly authorized by the act of March 2, 1799, c. 22, sec. 66, 1 Stat. 677. In the case of *United States v. 43 Gallons of Whisky*, 93 U. S. 188, 23 L. Ed. 846, the property was seized by an Indian agent. This seizure was expressly authorized by section 20 of the act of March 15, 1864, c. 33, 13 Stat. 29. In *Coffey v. United States*, 116 U. S. 427, 6 Sup. Ct. 432, 29 L. Ed. 681, the distilling apparatus was seized by a deputy collector of internal revenue. He was expressly authorized to make such a seizure by section 3453 of the Revised Statutes (U. S. Comp. St. 1901, p. 2278). In *United States v. Winchester*, 99 U. S. 372, 25 L. Ed. 479, the cotton in question was seized by the naval forces of the United States in 1863, and afterwards condemned in the district court. It was claimed by the Attorney General that the condemnation could be sustained under the confiscation act of July 17, 1862, c. 195, 12 Stat. 589. That act declared in section 6 that it should be the duty of the President to seize property so made subject to confiscation.

Section 7 of that act provided that, after the property should have been seized, a proceeding in rem should be instituted in the district court. It was held that the decree of condemnation was invalid because there was no previous seizure of the property under any order of the executive. It will be noted that in that case there was a seizure in fact, but the court held that the seizure could not confer jurisdiction upon the district court, because it was not made by a person who was authorized to make it. This would seem to support the view hereinbefore stated, to the effect that under the law now existing in the United States a private person cannot seize property forfeited to the Government. When the terms of the Food and Drugs Act, which relate specifically to the seizure, are considered, it will be seen that they lend no support to the theory that there must be a seizure before the filing of the libel. If the phrase "for the enforcement of the penalties," found in section 5, can be said to include a forfeiture, it is still to be observed that the district attorney is required to cause the appropriate proceedings to be commenced in court. Section 10 nowhere provides that the property shall be seized, and then a libel filed for condemnation. It, on the contrary, provides that the article if adulterated shall be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. This language indicates that the procedure shall be commenced in the district court before the property is seized.

In most of the cases which have arisen under the act to which my attention has been called, it seems that libels were filed before the seizure. *United States v. 779 Cases of Molasses*, 174 Fed. 325, 98 C. C. A. 197; *United States v. 100 Cases of Tepee Apples* (D. C.) 179 Fed. 987; *United States v. 5 Boxes Asafoetida* (D. C.) 181 Fed. 561; *United States v. 68 Cases of Syrup* (D. C.) 172 Fed. 781; *United States v. 65 Casks Liquid Extracts* (D. C.) 170 Fed. 449; *United States v. 50 Barrels of Whisky* (D. C.) 165 Fed. 966.

The first exception to the libel is therefore overruled. A similar exception was sustained in a case in the Southern District of Ohio reported in a bulletin issued by the Department of Agriculture on January 12, 1911, entitled Notice of Judgment, No. 697, Food and [307] Drugs Act.¹ For the reasons hereinbefore stated, I cannot agree with the conclusion reached in that case.

2. The second exception to the libel is as follows:

That the libel herein was not verified by any person having knowledge of the facts therein set forth, and that no probable cause for the seizure of said property is shown.

The libel was, in fact, verified by the district attorney as of his own knowledge. Moreover, rule 1 of the admiralty rules of this court provides that libels shall be verified, except those filed on behalf of the United States. It may be added, also, that, whatever objections might have been made to the issuance of the warrant to the marshal founded upon such a verification, the want of a sufficient verification is no ground for exception or demurrer to the substance of the libel.

The second exception is overruled.

3. The third exception is based upon the fact that the date when the eggs were shipped from Chicago is not stated; that, therefore, this shipment might have been made before the Food and Drugs Act went into effect; and that the property is not sufficiently identified. In *The Confiscation Cases*, 20 Wall. 92, it was said on page 106, 19 L. Ed. 196:

In admiralty proceedings a libel in the nature of an information does not require all the formality and technical precision of an indictment at common law.

And on page 107 of 20 Wall., 19 L. Ed. 196:

In proceedings in admiralty the same strictness is not required as in proceedings in common-law courts. And where the seizure is on land [said he], although the proceedings would seem to be analogous to informations in the Exchequer, yet I do not know that in our courts the rigid principles of the common law applicable to such informations have been solemnly recognized.

In *Oakes v. United States*, 174 U. S. 778, 790, 19 Sup. Ct. 864, 868, 43 L. Ed. 1169, it was said:

The proceedings were in conformity with the practice in admiralty, and were not governed by the strict rules that prevail in regard to indictments or criminal informations at common law.

The defense suggested by these exceptions can without difficulty be raised by the claimant in its answer. They are accordingly overruled.

4. It is said in claimant's brief that the fourth, fifth, and sixth exceptions are founded upon the same omission in the libel, namely,

¹ See *United States v. Eight Packages or Casks of Drug Products*, p. 305, *ante*.

that it does not allege that the eggs have been transported for sale. During the hearing it was stated at the bar that as a matter of fact the Loose-Wiles Biscuit Company did not intend to sell the eggs, but to use them in manufacturing. At the time the exceptions were argued (March 10th) this contention presented a serious question. But three days thereafter (March 13, 1911) the Supreme Court decided the case of the *Hipolite Egg Co. v. United States*, 220 U. S. 45, 31 Sup. Ct. 364, 55 L. Ed. 364. The facts of that case are therein stated, as follows:

On March 11, 1909, the United States instituted libel proceedings under section 10 of the act of Congress of June 30, 1906, c. 3915, 34 Stat. 771 [308] (U. S. Comp. St. Supp. 1909, p. 1193), against 50 cans of preserved whole eggs which had been prepared by the Hipolite Egg Company of St. Louis, Mo. The eggs before the shipment alleged in the libel were stored in a warehouse in St. Louis for about five months, during which time they were the property of Thomas & Clark, an Illinois corporation engaged in the bakery business at Peoria, Ill. Thomas & Clark procured the shipment of the eggs to themselves at Peoria, and upon their receipt of them placed the shipment in the storeroom in their bakery factory along with other bakery supplies. The eggs were intended for baking purposes, and were not intended for sale in the original, unbroken packages or otherwise, and were not so sold. The Hipolite Egg Company appeared as claimant of the eggs, intervened, filed an answer, and defended the case, but did not enter into a stipulation to pay costs.

The claims of the egg company, as far as they are material here, are stated by the court as follows:

The egg company, whilst not contending that the shipment of the eggs was not a violation of section 2 of the act, and a misdemeanor within its terms, and not denying the power of Congress to enact it, presents three contentions: (1) Section 10 of the Food and Drugs Act does not apply to an article of food which has not been shipped for sale, but which has been shipped solely for use as raw material in the manufacture of some other product. (2) A United States district court has no jurisdiction to proceed in rem under section 10 against goods that have passed out of interstate commerce before the proceeding in rem was commenced.

After discussing the cases cited by the claimant upon the hearing in the case at bar, the Supreme Court declared that the first contention of the egg company was untenable.

The fourth, fifth, and sixth exceptions are accordingly overruled.

5. The seventh exception is based on the claim that it nowhere appears that the eggs in question are still subject to the provisions of the act. It is said that the power of the Federal Government over interstate shipments ceases when the shipments become a part of the State property. It will be noticed that this question also was raised in the case of the *Hipolite Egg Co. v. United States*, supra. In answer to the second claim of the egg company, which has heretofore been stated, the court said:

There is here no conflict of national and state jurisdictions over property legally articles of trade. The question here is whether articles which are outlaws of commerce may be seized wherever found, and it certainly will not be contended that they are outside of the jurisdiction of the National Government when they are within the borders of a State. The question in the case, therefore, is: What power has Congress over such articles? Can they escape the consequences of their illegal transportation by being mingled at the place of destination with other property? To give them such immunity would defeat, in many cases, the provision for their confiscation, and their confiscation or destruction is the especial concern of the law. The power to do so is certainly appropriate to the right to bar them from interstate commerce, and completes its purpose, which is not to prevent merely the physical movement of adulterated

articles, but the use of them, or, rather, to prevent trade in them between the States by denying to them the facilities of interstate commerce. And appropriate means to that end, which we have seen is legitimate, are the seizure and condemnation of the articles at their point of destination in the original, unbroken packages. The selection of such means is certainly within that breadth of discretion which we have said Congress possesses in the execution of the powers conferred upon it by the Constitution. *McCulloch v. Maryland*, 4 Wheat. 316 [4 L. Ed. 579]; *Lottery Case*, 188 U. S. 321, 355 [23 Sup. Ct. 321, 47 L. Ed. 492].

[309] The seventh exception is accordingly overruled.

The claimant is given 10 days from this date within which to answer the libel.

UNITED STATES v. SCHRAUBSTADTER ET AL.

(District Court, N. D. California, April 5, 1911.)

N. J. No. 1020.

Wine produced in California, and labeled "Crown Brand Champagne" and "Extra Dry Champagne," held misbranded.¹

Indictment against Ernest Schraubstadter and Emile A. Groezinger, doing business in San Francisco, Cal., under the name of A. Finke's Widow, charging, in three separate counts, three shipments in violation of the Food and Drugs Act—two directly by the defendants named, on or about December 28, 1909, from the State of California into the State of Washington, and the other by McDonald & Cohn, San Francisco, Cal., some time after November 23, 1909, from the State of California into the State of Arizona—of ten and two cases of half bottles of champagne, respectively, which were misbranded under section 8 of the act. The first two shipments were of five cases each.

The indictment further charged in the third count that the defendants Schraubstadter and Groezinger sold and delivered to McDonald & Cohn, on or about November 23, 1909, the two cases of half bottles of champagne subsequently shipped by them as indicated, and that on January 22, 1910, the defendants, in addition to the printed guaranty upon the main label on each of the bottles in the two cases of champagne, gave a written guaranty that the goods conformed to the provisions of the Food and Drugs Act, which guaranty was false and illegal, under section 9 of the act.

The label on the neck of each of the bottles in five cases shipped by defendants contained the words: "Champagne Brand Dufleur Fils & Cie. Grand Vin Royal. Guaranteed under the Pure Food and Drugs Act, June 30th, 1906, Serial No. 7016" (with a design of a fancy coat of arms).

The label on the neck of each of the bottles in the other five cases shipped by the defendants contained the words "Extra dry" (with a design of a crown), and the main label on each of the bottles contained the words: "Crown brand champagne" (with the design of a crown and crossed scepter), and underneath the words "Guaranteed under the National Pure Food and Drugs Act, June 30th, 1906."

¹ Affirmed, *Schraubstadter et al. v. United States*, p. 564, *post*.

The label on the neck of each of the bottles in the two cases specially guaranteed by the defendants to McDonald & Cohn, and shipped by them as indicated, contained the words "Extra dry champagne" (with a design of a shield and the monogram A. F. W.), and the main label on each bottle contained the words "Cuvee Special E. L. Mercier & Cie. Brand Extra Dry. Guaranteed under the Pure Food and [2] Drugs Act, June 30th, 1906. Serial No. 7016."

Examination by the Bureau of Chemistry of samples of every one of the three shipments of the product showed that the article was not champagne, but a white wine artificially carbonated, and of domestic manufacture. Misbranding was therefore charged by the indictment for the reason that the product was labeled and branded so as to deceive and mislead the purchaser, and purported to be a foreign product when it was of domestic origin. False and illegal guaranty by the defendants was charged because they gave to the dealer, McDonald & Cohn, a guaranty signed by them, to the effect that the product was not misbranded within the meaning of the Food and Drugs Act when in fact it was misbranded.

After general demurrer to the indictment, which was overruled, and waiver of a jury by the defendants, the case was tried by the court. Judgment of guilty.

DIETRICH, *District Judge*. That my views upon certain questions discussed at the trial may not be misunderstood they are stated to be as follows:

First. In an indictment charging the violation of the provisions of section two of the "Pure Food Act," approved June 30, 1906, it is not incumbent upon the Government either to charge or to prove compliance by the administrative officers with the provisions of section 4 of the act, whether the hearing therein prescribed has or has not taken place.

Second. By reason of the provisions of section 9 of the act, the third count is deemed to state a public offense.

Third. The term "Champagne" when used alone and apart from any qualifying or descriptive words is commonly understood to describe an effervescent or sparkling wine produced in a province of France, the gas therein being the result of natural fermentation. It is therefore thought that a bottle containing wine produced in California and labeled "Champagne" without any other qualifying or descriptive words, tends to mislead and deceive and is "misbranded" under the provisions of the pure food act.

[3] Fourth. It is further thought that a bottle containing a wine having substantially the same qualities as the champagne manufactured in France and produced substantially in the same way, although originating in California, should not be held to be misbranded if it is labeled "California Champagne," or if by some other device conspicuously displayed in connection with the word champagne, purchasers are clearly advised that the bottle does not contain a product of France.

Fifth. Upon the question whether or not a wine artificially carbonated, may, under any circumstances or wherever produced, be legitimately labeled champagne, I express no opinion. It is doubted whether the record here presents the question with such fullness as its very great importance requires.

Sixth. Specifically I find that the label on each of the three bottles received in evidence in support of the three several counts of the indictment, is misleading. Considering the form and dress of each package as a whole there is little room for doubt of a design upon the part of the originator to create in the minds of consumers the impression that they are purchasing a foreign and not a domestic product.

UNITED STATES v. 40 BARRELS AND 20 KEGS OF COCA-COLA.

(District Court, E. D. Tennessee, S. D., April 6, 1911.)

191 Fed. 431; N. J. No. 1455.

A beverage labeled "Coca-Cola" held to be an article sold under its own distinctive name, and not adulterated or misbranded.¹

Libel under section 10 of the Food and Drugs Act. On motion by claimant for directed verdict. Sustained in part. Verdict for claimant. Libelant's motion for a new trial overruled.

[432]² A libel for condemnation was filed in the name of the United States of America by the United States attorney under section 10 of the Food and Drugs Act, June 30, 1906, c. 3915, 34 Stat. 771 (U. S. Comp. St. Supp. 1909, p. 1193) for the seizure for confiscation of 40 barrels and 20 kegs of a food product labeled "Coca-Cola," alleged to be adulterated and misbranded under the said Food and Drugs Act, which the Coca-Cola Company of Atlanta, Georgia, had caused to be transported for sale by an interstate carrier from Atlanta, Ga., to Chattanooga, Tenn., consigned to the Coca-Cola Bottling Works, for the use of itself and other persons, and which then remained in the original unbroken packages in Chattanooga, Tenn. An amended libel was subsequently filed.

The original and amended libels alleged that said food product was adulterated under the Food and Drugs Act in this: (a) That it contained an added ingredient, caffeine, which was a poisonous ingredient and might render said food product injurious to health; (b) that it contained an added ingredient, caffeine, which was a deleterious ingredient and might render said food product injurious to health; and (c) that said food product had been mixed, colored, coated or stained by the use of caramel and other coloring and flavoring substances, whereby damage or inferiority of said food product was concealed.

The libels further alleged that said food product was misbranded under the Food and Drugs Act in this: (1) That the label on each package contained the statement "Delicious and Refreshing Coca-Cola," the expression "Coca-Cola" thus employed being a representation of the presence in said food product of the substances coca and cola, substances known under their own distinctive names; whereas said food product contained no coca and little, if any, cola, and said food product was therefore an imitation of the articles or substances coca and cola, and offered for sale under the distinctive

¹ Affirmed by the Circuit Court of Appeals, Sixth Circuit, p. 710, *post*.

² Numbers in brackets refer to pages of Federal Reporter.

names of said two substances and said statement was a false and misleading statement regarding the ingredients and substances contained in said food product; and (2) that the label on each package also had a pictorial design of cocoa leaves and cola nuts, being a suggestion and representation of the presence in said food product of both coca, the leaves of the coca plant, and cola, the nut or fruit of the cola plant, when in truth said food product did not contain any coca, and little, if any, cola, in its composition, and said pictorial design was thus a false and misleading design regarding the ingredients and substances contained in said product.

After seizure of the food product the Coca-Cola Company intervened as its claimant and filed answers to the original and amended libels in which it admitted the shipment and labeling of the food product Coca-Cola as alleged. [433] It further admitted that one of the ingredients contained in said Coca-Cola was a small proportion of caffeine, but denied that as contained in said product it was a deleterious ingredient or rendered the product injurious to health, and further denied that it was an "added ingredient"; and averred that said Coca-Cola was a mixture or compound of which caffeine was an essential constituent, whose presence did not constitute an adulteration under the Food and Drugs Act. It further admitted that said product did not contain the chief active principle of coca leaves, but denied that the name was intended to indicate that it did contain said principle, and denied that the name Coca-Cola was a representation of the presence of the substances coca and cola, or that there were substances known as coca and cola, but averred that it did contain certain elements or substances derived from coca leaves and cola nuts, and that no valuable constituent under the formula of Coca-Cola had been abstracted from the compound. It further averred that the name Coca-Cola as contained on the labels was a reproduction or facsimile of the registered trade-mark under which said product had been made and sold for more than twenty years; that said product was a mixture or compound which had been widely and generally known under the aforesaid name, which was its own distinctive name, and an arbitrary and fanciful name clearly distinguishing it from any other food product, mixture or compound; and that the name was accompanied on the labels with a statement of the places where it was manufactured or produced; that it did not contain any added poisonous or deleterious ingredient, and was not an imitation of or offered for sale under the distinctive name of any other article. All other allegations as to the alleged adulteration or misbranding of the food product were denied.

The claimant having demanded a trial by jury of the issues of fact joined in the case, a trial was had before the court and jury. At the conclusion of all the evidence the claimant moved the court for peremptory instructions to the jury to return a verdict in its favor.

SANFORD, *District Judge*. 1. The chief question in this case arises under the allegations of the Government's libel that the food product, Coca-Cola, which it seeks to condemn, is adulterated in that it contains "an added ingredient, caffeine," which is alleged to be a poisonous and deleterious ingredient that may render such food product injurious to health.

Assuming, for the purpose of determining this motion, that if the caffeine, which is admittedly contained in the Coca-Cola in the proportion of about one and one-fifth grains to each fluid ounce of the syrup, is an "added" ingredient within the meaning of the Food and Drugs Act, there is such conflict in the evidence as to whether it is a deleterious ingredient which may cause injury to the health, that the question of its qualities and effect should be submitted to the jury for determination, as a question of fact and not of law, the preliminary question arises, whether, upon the undisputed evidence in this case, it can be deemed an "added" ingredient to the Coca-Cola within the meaning of the Food and Drugs Act, so that its presence can in any event cause an adulteration of that article within the meaning of the act.

The material provisions of the act, in so far as they bear upon this question, are as follows:

By section 6 it is provided that the term "food," as used therein, shall include all articles used for food, drink, confectionery or [434] condiment by man or other animals, whether simple, mixed or compound.

By section 7 it is provided that confectionery shall be deemed to be adulterated if it contain any "mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health"; and that an article of food shall be deemed to be adulterated "if it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health."

By section 8 it is provided that an article of food shall be deemed to be misbranded—

If the package containing it or its label shall bear any statement, design or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced;

and—

Provided further, That nothing in this act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding.

And by section 11 it is provided that if it shall appear to the Secretary of Agriculture upon examination of samples, "That any article of food or drug offered to be imported into the United States is adulterated or misbranded within the meaning of this act, or is otherwise dangerous to the health of the people of the United States such article shall be refused admission."

In determining the meaning and effect of these provisions of the act, I have been greatly aided by the argument of counsel for both parties, who have clearly and forcibly stated their respective contentions, and who have conducted the case throughout with signal ability, learning, and effectiveness.

Comparing then these several provisions of the act, so as to give each its reasonable and just meaning, consistently with each other and in accordance with the general purpose of the act, I am constrained to conclude that the use of the word "added" as applied to poisonous and deleterious ingredients in articles of food other than confectionery, in sections 7 and 8 of the act, can not be regarded as meaningless; and that, by contrast with the provision in section 8 that confectionery, which is usually an artificial compound, shall be deemed to be adulterated if it contain any "ingredient deleterious or detrimental to health," and with the provision in section 11 that admission may be refused to any food or drug offered to be imported into the United States if it be adulterated or misbranded within the meaning of the act or "otherwise dangerous to the health of the people of the United States," it was intended to provide by sections 7 and 8 that any articles of food manufactured and sold in this country in interstate [435] commerce should not be deemed to be adulterated merely because they contained a poisonous or deleterious ingredient, except in the case of confectionery, but that all other articles of food, whether simple or compound, were not to be deemed adulterated on account of the presence of a poisonous or deleterious ingredient unless such ingredient was "added" to the article of food in question, that is, was an ingredient foreign to its natural or normal constituency; and that this distinction applies, by the specific provisions of section 8, to compound articles of food known under their own distinctive names, not an imitation of or offered for sale under the distinctive name of any other article, and properly labeled as to the place of manufacture.

Thus a natural article of food, for example, coffee, can not be deemed adulterated, even although the average cup contains a larger amount of caffeine than an ordinary drink of Coca-Cola, and even if caffeine may be properly regarded as a deleterious ingredient injurious to health, since such caffeine is clearly not an added ingredient to the coffee, foreign to its composition, but is one of the essential ingredients naturally and normally entering into its composition. So an article of food which is not sold under a distinctive trade-name but under a well recognized name that has acquired a distinct meaning in general popular usage, as for example, sausage, can not be deemed adulterated within the meaning of the act, however deleterious to health some of its normal ingredients may be, provided that, as manufactured and sold, it does not contain any other poisonous or deleterious ingredients, added to its normal and customary constituents. And so, likewise, I think it is clear from the provisions of the act that a compound article of food which is manufactured and sold under its own distinctive name and properly labeled, with whose qualities and effect the public has been familiar, and for which they see fit to buy it, is not to be deemed adulterated within the meaning of the act, provided that when manufactured and sold under this distinctive name it contains no poisonous or deleterious ingredients in addition to its normal and customary constituents, as it has been habitually and regularly manufactured and sold to the public under such distinctive name; although, of course, if it were attempted to add to an article of food thus sold under its distinctive name another ingredient which it had not regularly and habitually contained under

the distinctive name under which it had been sold to the public, and such added ingredient were poisonous or deleterious, it would thereby become subject to condemnation under the provisions of the act.

To hold otherwise would, in my opinion, render the word "added" as repeatedly used in the act in connection with poisonous and deleterious ingredients, entirely meaningless, and would involve an irreconcilable contradiction in the clauses of the act in which it is expressly provided that a mixture or compound known as an article of food under its own distinctive name, not an imitation of or offered for sale under the distinctive name of another article of food, and not containing any "added" poisonous or deleterious ingredient, shall not be deemed to be adulterated. The conclusion is, to my mind, unavoidable, that by the use of this language Congress intended to provide [436] that a compound article of food thus known, labeled and sold under its own distinctive name, should be assimilated to a natural product and not be deemed to be adulterated, whatever the character of its ingredients, if it contained no ingredients other than those habitually and regularly entering into it as constituents under the form and with the characteristics with which it had acquired its distinctive name and become known to the public. In this case, as in the case of a natural food product, if the article is sold under the same distinctive name, with the same constituents and with the addition of no other ingredients whatever, the public in purchasing the article is not deceived—as it would be if an essential constituent ingredient were left out—but on the contrary obtains exactly the article which it has been accustomed to buy under this distinctive name, and which possesses exactly the qualities and produces exactly the effect which renders it in the mind of the public a desirable article of consumption, without addition, change or adulteration. And while it is true that a purchaser of Coca-Cola, for example, may not know either that it contains caffeine at all or the actual quantity of caffeine that it contains, the same thing may be true of the purchaser of coffee, or of other natural foods containing poisonous or deleterious ingredients. However, in the one case, as in the other, the purchaser obtains the article which he desires in its entire make-up and composition, without addition or subtraction, and without the addition of any deleterious ingredient with whose effect he is unaccustomed, and which he does not desire. In short, in the one case, as in the other, the public obtains without deception exactly the article which it wishes to buy, producing the effect which it desires; and in the one case as well as in the other, I think the article cannot be properly said to be adulterated within the meaning of the Food and Drugs Act, and the plainly expressed intention of Congress on this subject.

To hold otherwise, in my opinion, would be beyond the province of the court and an attempt to reach by judicial construction a supposed evil in the composition of articles of food sold under their distinctive names, which, if a remedy be required, can only properly be obtained by legislation. It is well settled that the function of the court in the enforcement of a statute is limited to the ascertainment of the legislative intent as expressed in the act, and cannot extend to either legislation or amendment; and that consideration of

apparent hardship will not justify a strained interpretation of the law as it is written. The question therefore as to whether the act as drawn is lacking in essential provisions for the protection of the public health in failing to provide that other articles of food, as well as confectionery, shall be deemed adulterated if they contain any ingredient deleterious or detrimental to health, is clearly a legislative question which is not within the province of the court to determine.

Applying the act as thus construed to the undisputed facts in evidence, I find the facts established, without any contradictory evidence, to be: That the name "Coca-Cola" is a "trade-name" which has for many years been given by the manufacturer to the food product in question, and upon which name a trade-mark was many years [437] ago obtained; that this food product is an artificial compound used in the preparation of beverages, consisting of a sweet syrup, colored with caramel, with some phosphoric acid, lemon juice and other minor ingredients, with perhaps some ingredients or qualities derived from the coca leaves and cola nuts which are used to a certain extent in its preparation, after being subjected to a process by which the cocaine and certain other ingredients are extracted, and also containing as an essential ingredient of the compound, caffeine, obtained in the main by chemical extraction from theine; that this compound has been for many years manufactured under a formula prescribing certain definite proportions of such caffeine as one of its essential ingredients; that for many years as so manufactured and sold it has regularly and habitually contained the same approximate amount of caffeine, being about one and one-fifth grains to each fluid ounce of the syrup, although slightly less caffeine is contained in the syrup prepared for use in bottles than in that prepared for use at soda fountains, and although the percentage of caffeine in each individual container may vary slightly owing to process of manufacture employed, the average caffeine content being, however, substantially as above stated; that for many years this compound containing such caffeine has been sold under this trade-mark name of "Coca-Cola," has been extensively advertised under this name, and has under this name become generally known to the trade and to consumers in the United States; that no other article of food or beverage has been either manufactured or sold under the name of "Coca-Cola"; that it imitates no other article and is not sold under the distinctive name of any other article and that this name distinguishes this particular product from all other beverages and articles and clearly identifies it as a particular kind and brand of beverage made by its manufacturer and sold under this name, and distinguishes it from all other beverages or food products manufactured and sold by other persons.

I therefore find, as a conclusion of law, from these facts, that the name "Coca-Cola," is and was at the time this libel was filed, a distinctive name which clearly distinguishes this particular compound from any other food product; and I further find from the undisputed facts in evidence that the "Coca-Cola" sought to be condemned in this case is and was when the libel was filed, a compound known as an article of food under its own distinctive name; that it is and was not an imitation of or offered for sale under the distinctive name of any other article; that the name on the label is and was accompanied with a statement of the places where the article was manufactured;

and that the caffeine which it contained is and was not an "added ingredient" within the meaning of the Food and Drugs Act but is and was a usual and normal constituent of the article that had been and was known to the public under the distinctive name of "Coca-Cola." And I therefore conclude that as a matter of law the Coca-Cola in question is not to be deemed as adulterated by the presence of caffeine as an "added" ingredient within the true intent and meaning of the act.

The conclusion thus reached is strengthened by a consideration of the pleadings in this case. In the libel it is alleged that the food product [438] "Coca-Cola" which it was sought to condemn is adulterated in that it contained an "added ingredient" caffeine, which was and is both poisonous and deleterious, yet the entire proof unquestionably shows that the caffeine contained in the article Coca-Cola is one of its regular, habitual and essential constituents, and that without its presence, that is, if it were de-caffeinized, so to speak, the product would lack one of its essential elements and fail to produce upon the consumers a characteristic if not the most characteristic effect which is obtained from its use. In short Coca-Cola without caffeine would not be Coca-Cola as it is known to the public and would not produce the effect which the Coca-Cola bought by the public under that name produces, and if it were sold as "Coca-Cola" without containing caffeine the public buying it under this name would be in fact deceived.

The Government's contention then, under the proof, leads to this—there being, it is to be observed, no issue raised in the pleadings as to the amount of caffeine contained—that an entire compound containing a certain ingredient, which is one of its essential ingredients, and without which the compound would lose its characteristic qualities, is, as an entire compound, to be deemed adulterated because it contains such ingredient, on the theory that such ingredient is added to the compound, as distinguished from being contained in it as an essential constituent of the entire compound. It is difficult to see, however, how any part which is an essential of an entire article, and without which the entire article would not exist, can be properly deemed to be added to the entire article, or in short, to be added to or adulterate itself.

The case would be different, of course, if the libel alleged that any other constituent element of the compound as for example the syrup, was sold as syrup, and in fact adulterated with caffeine. That, however, is not this case. The libel specifically alleges that the food product "Coca-Cola" is adulterated by the addition of caffeine, and the proof unquestionably shows that the caffeine is not an addition to this compound, but is one of its essential and normal ingredients under the distinctive name under which it has been sold and is known to the public.

It results that in so far as the libel charges that Coca-Cola is adulterated because it contains caffeine as an added ingredient, the claimant's motion for peremptory instructions must be sustained.

2. It is also alleged in the libel that the name "Coca-Cola" as used on the label suggests and represents the presence in this food product of coca, meaning the leaves of the coca plant, and that this product does not in fact contain any coca in its composition, thereby

constituting a false and misleading statement regarding the ingredients and substances contained in the "Coca-Cola."

Assuming, for the purposes of determining this motion that there may be a disputed question of fact as to whether the use of the word "coca" in the name contained upon the label is to be regarded intrinsically and originally as a statement of suggestion of the presence in the product of the leaves of the coca plant or of some material element or quality derived therefrom, and further assuming that there may be a conflict in the [439] evidence as to whether or not there is contained in "Coca-Cola" any portion of the leaves of the cola plant or any substance or quality derived therefrom to any material degree, the preliminary question arises as to whether, upon the other undisputed facts in evidence these issues of fact shall be submitted to the jury for their determination, as questions of fact, or whether under the other undisputed evidence in the case, these allegations, if true, are, as a matter of law, immaterial.

Without stating my reasons in detail it is sufficient at this time to say that after careful consideration of the question I have, for reasons directly analogous to those which determined my conclusions in reference to the adulteration of an article sold under the distinctive name, concluded that it was the intention of Congress to provide that where a compound article of food was known under its own distinctive name, was not an imitation of any other article of food or sold under the distinctive name of any other article, was properly labeled as to the place of manufacture, and contained no "added" poisonous or deleterious ingredient, it should not be deemed misbranded within the meaning of the Food and Drugs Act in so far as any statement or suggestion contained in the name itself is concerned. To hold otherwise would, in my opinion, involve an absolute and irreconcilable contradiction between the several clauses in section 8 of the act, and would render meaningless the express provision of that section that a compound known as an article of food under its own distinctive name, not an imitation of or offered for sale under the distinctive name of another article, properly labeled with the place of manufacture, and not containing any added poisonous or deleterious ingredients, shall not be deemed to be misbranded. Obviously if the article contains the same constituents as those normally and regularly contained under the distinctive name under which it is sold and under which it is known to the public, the distinctive name indicating this distinctive article, is not misleading, but on the contrary serves to directly inform the public that it is the specific article which the public knows under that name and desires to buy.

It results from the facts hereinbefore found from the undisputed evidence that in so far as the libel charges the misbranding of the Coca-Cola by reason of any false statement or suggestion contained in the name itself, the claimant's motion for peremptory instructions must be sustained.

3. It also results from what has been heretofore stated that in so far as the libel charges that the Coca-Cola is misbranded because of being an imitation of or offered for sale under the distinctive name of another article, in the entire absence of evidence to show that this is the case, the claimant's motion for peremptory instructions in so far as this charge of the libel is concerned must also be sustained.

4. With reference to the charge that the Coca-Cola was misbranded by reason of being mixed, colored or stained by the use of coloring substance whereby damage or inferiority of the mixture was concealed, without expressing any opinion upon the weight of the evidence, I am of the opinion that the evidence is not so undisputed as to constitute [440] the solution of this question a mere matter of law, but that this question should be left to the jury under the issues raised by the pleadings.

So far, therefore, as this charge in the libel is concerned, claimant's motion must be overruled.

5. As to the charge in the libel that the pictorial design of coca leaves on the labels is misleading in that it represents and suggests the presence of the substance coca in the "Coca-Cola" product I have had great difficulty. While it is apparently true that under the provision of the act heretofore quoted that no compound food product sold under its own distinctive name shall be deemed to be misbranded, when it contains no added poisonous or deleterious ingredient and is otherwise sold and labeled in accordance with the act, it would apparently follow, as a matter of the strict letter of the law, that in the absence of any added poisonous or deleterious ingredient, a product thus sold under its distinctive name cannot be deemed misbranded upon any ground. I have concluded however, that giving a fair and reasonable construction to the somewhat conflicting provisions of the act, it was only intended to protect an article sold under its distinctive name from the charge of misbranding in so far as any statement or suggestion contained in the name itself is concerned, and that it was not intended to prevent the condemnation of the article as misbranded, even though sold under its own distinctive name, if in addition to such distinctive name the label contains other misleading statements, designs or devices. Without expressing any opinion as to whether the pictorial design on the label in question is misleading in any particular as to the presence of coca leaves or any ingredient or quality derived therefrom, I am of the opinion that under the evidence in the case this is not purely a question of law, but is a question of fact, which, under all the evidence should be submitted to the jury for its determination. Therefore in so far as the charge of misbranding based upon the pictorial design of coca leaves upon the label is concerned, the claimant's motion for peremptory instructions will be overruled.

To the extent hereinabove stated the claimant's motion for peremptory instructions is accordingly sustained; otherwise it is overruled.

Thereupon counsel for libelant stated to the court that it was desired by the Government to test, as speedily as possible, the question as to whether the Coca-Cola which it seeks to condemn is adulterated in that it contains "an added ingredient, caffeine," which is alleged to be a poisonous and deleterious ingredient that may render such food product injurious to health, and to facilitate an appeal, and therefore moved the court to dismiss, without prejudice, as to the matters involved in paragraphs numbered 4 and 5 of the above opinion, which motion was allowed. The court then proceeded to instruct the jury as follows:

The COURT. In pursuance of my action on the claimant's motion for peremptory instructions, and in consequence of the dismissal by the Government in open court and in your presence of the two questions of disputed facts in the case, which I think ought to be submitted to you for your consideration, and in consequence of the fact that upon the other questions in the case upon the undisputed evidence in my opinion the Government is not entitled to a verdict at your hands, and in consequence of my action in sustaining the motion for a peremptory instruction as to such other grounds, I now direct you to return a verdict in favor of the claimant, the Coca-Cola Company. You may return that without leaving your seats.

UNITED STATES v. TUCKER.

(District Court, S. D. Ohio, April 8, 1911.)

N. J. No. 1077.

A drug labeled "Nathan Tucker, M. D., specific for asthma, hay fever, and all catarrhal diseases of the respiratory organs," held misbranded in that it contained cocaine, the quantity or proportion of which was not stated on the label.

Information alleging shipment, in violation of the Food and Drugs Act, of a drug product labeled "Nathan Tucker, M. D., specific for asthma, hay fever, and all catarrhal diseases of the respiratory organs." Misbranding was alleged in the first count of the information because said drug contained cocaine and the label bore no statement of the quantity or proportion of cocaine contained in said drug; and in the second count for the reason that the use of the word "specific" on the label was false and misleading and calculated to mislead and deceive the purchaser in that it represented the drug as a complete cure for the diseases named on said label when in fact the ingredients of said drug were not a sure or complete cure for said diseases.

The defendant filed a demurrer to the information, together with a motion to quash the information. Demurrer and motion of defendant overruled by the court. Plea of not guilty. Jury trial. Verdict of guilty as to the first count and not guilty as to the second count of the information. Motions in arrest of judgment and for new trial. Overruled.

[2] SATER, *District Judge* (on motion for a new trial). The defendant delivered at Mt. Gilead, Ohio, and shipped from that place to one Henson (whose real name is Morgan), residing at Washington, D. C., a bottle of medicine containing cocaine. The bottle bore no label or brand indicating the presence of that drug in the medicine. The jury having found him guilty of violating the Pure Food and Drugs Act, June 30, 1906, 34 Stat. 768, he moves to set aside the verdict on the ground that he was engaged in intrastate and not in interstate commerce.

In answer to an inquiry from Henson, the defendant mailed him an examination or symptom blank and what is manifestly a previously prepared stock letter, stating that under a separate cover were for-

warded to him circulars fully explaining the defendant's system of relief and cure for asthma, hay fever and nasal catarrh, and naming the cost of treatment. Henson was requested to fill out the blank and return it with full payment in advance, on receipt of which a treatment would be sent by express without delay. Henson filled out the symptom blank and returned it with a postal order for the sum named. Thereupon the defendant deposited in the mail at Mt. Gilead a bottle containing two ounces of the medicine, addressed to Henson, and also shipped to him by express an atomizer, both of which were received by Henson at Washington. Later a second bottle of medicine was sent in the same manner as the first. Henson made no suggestion and gave no direction as to the mode of transporting any of the medicine.

Was the transaction in which the defendant engaged interstate commerce? His contention is that the sale and delivery were completed in Ohio, when the medicine was deposited in the mail, and that the title thereto then and there passed to the purchaser, free from any interest of the defendant therein, that the delivery to the postal department for transmission to Henson was a delivery to him, and that consequently the transaction was wholly intra-state and governed by the Ohio law of sales, 99 Ohio L., 413-425, Secs. 8381-8455, Ohio General Code. He claims that the fact that the sale was made with the intent that the medicine should be transported from Ohio to the District of Columbia after the sale and delivery were fully completed did not impart an interstate character to the transaction, because the agent by whom the transportation was effected—the United States mail—was the agent of the purchaser and not of himself. To sustain his contention he relies on *State v. Mullin*, 78 Ohio St., 358. In that case a resident of Harrison County gave an order by mail to a resident of Jefferson County for a case of beer to be forwarded to the purchaser by express, marked C. O. D. The beer was sent, received, and paid for. It was held that the express company was the agent of the purchaser to receive the goods from the seller and the agent of the seller to receive their price from the purchaser, and that upon delivery to the carrier the title to the goods passed to the purchaser, although he was not entitled to their actual possession until he paid or tendered the purchase price. It was further held that the place of both the sale and delivery was the place of the seller's residence, and that the sale was completed when the seller delivered the goods to the carrier. [3] The transaction was wholly intra-state and the goods were shipped under instructions given by the purchaser. The facts of that case and the law applicable thereto readily distinguish it from the case at bar.

The second section of the Pure Food and Drugs Act is limited in its application to interstate and foreign commerce. The prohibition therein contained runs against the introduction of misbranded drugs into any State, or Territory, or the District of Columbia, from any other part of the United States, or from any foreign country. The offense with which the defendant is charged is the shipment and delivery of such a drug for shipment to a point outside of the State, an offense which is punishable whether the destination of the article shipped or delivered for shipment is within the United States or in a foreign country. He solicited and obtained the de-

fendant's order for the medicine. He knew that the transaction, if consummated, would necessitate interstate transportation. That the negotiations were conducted by mail is unimportant. Commerce is intercourse, *Gibbons v. Ogden*, 9 Wheat. 189, 193, and for the purposes of commercial intercourse parties may avail themselves of the mails as well as of traveling salesmen, *Robbins v. Shelby Taxing District*, 120 U. S. 489, 495, or of the telegraph, *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, or the telephone, *Central Union Telephone Co. v. State*, 118 Ind. 194; *Judson on Interstate Commerce*, Sec. 6.

Neither a sale nor the place of sale and delivery is alone the test of interstate commerce, nor does transportation, although an adjunct essential to commerce, constitute a transaction of interstate commerce. A sale, the parties to which are from different States, is a transaction of interstate commerce, wherever the contract of sale may be made, when the goods are to be transported from one State to another, whether the sale is made before or after shipment. The indispensable element and test of interstate commerce is importation into one State from another. Every negotiation, contract, initiatory and intervening act, trade and dealing between citizens of any State, or Territory, or the District of Columbia, with those of another political division of the United States, which contemplates and causes such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce. *United States v. Swift & Co.*, 122 Fed. 529, 531; *Butler Bros. Shoe Co. v. United States Rubber Co.*, 156 Fed. 1, 17; *Hopkins v. United States*, 171 U. S. 578, 597; 7 Cyc. 416; *Globe Elevator Co. v. Andrew*, 144 Fed. 871, 882; *Re Charge to the Grand Jury*, 151 Fed. 834, 839.) When the State courts have been called upon to express themselves, their utterances have been in harmony with the foregoing. (*Cooke v. Rome Brick Co.*, 98 Ala. 413; *Culverson v. American Trust & Banking Co.*, 107 Ala. 464; *Loverin & Browne Co. v. Travis*, 135 Wis. 322, 331.) In the last named case it is said that—

It cannot now be doubted that "commerce" in the Federal Constitution, comprehends all of the intercourse between the parties necessarily or ordinarily involved in a commercial transaction with reference to merchantable commodities. Nor can it be doubted that the solicitation of the purchaser by the seller, the contract of purchase and sale, and the actual physical delivery to the purchaser by whatever means may be selected are all inherent parts of the intercourse pertaining to trade or traffic in merchandise.

The transaction in which the defendant engaged was interstate commerce. The evidence justified the verdict returned by the jury, and the motion is therefore overruled.

UNITED STATES v. AMERICAN DRUGGISTS' SYNDICATE.

(Circuit Court, E. D. New York, April 11, 1911.)

186 Fed. 387; N. J. No. 1194.

A drug, labeled "Peroxide Cream," held not misbranded within the meaning of section 8 of the Food and Drugs Act, by reason of the fact that the quantity of peroxide in the article was insignificant.

Information charging misbranding in violation of the Food and Drugs Act. On demurrer to information. Demurrer sustained.

[388]¹ VEEDER, *District Judge*. The defendant has demurred to both counts of a criminal information charging it with misbranding a drug in violation of Act June 30, 1906, c. 3915, sec. 2, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1188), known as the Food and Drugs Act. Section 2 of the act prohibits "the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia of any article of food or drugs which is adulterated or misbranded within the meaning of this act," and provides that any person who shall ship or deliver for shipment, as therein described, any such article so adulterated or misbranded, shall be guilty of a misdemeanor. The offense of misbranding is defined in section 8 as follows:

That the term "misbranded," as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the packages or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

That for the purposes of this act an article shall also be deemed to be misbranded:

In the case of drugs:

First, if it be an imitation of or offered for sale under the name of another article.

Second, if the contents of the package as originally put up shall have been removed, in whole or in part, and other contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein.

The remainder of the section deals in similar detail with the case of foods.

The first count of the information alleges that the defendant shipped from the State of New York to the District of Columbia a certain article and drug, which was a mixture of substances for external use, upon which there was a label reading: "A. D. S. Peroxide Cream. Cleansing, Soothing and Healing to the Skin, Antiseptic, Cooling and Refreshing." Elsewhere upon the carton, and upon the package or jar enclosed therein, were immaterial variations of this statement of the properties and purposes of the preparation. It is charged that this was a misbranding within the meaning of the act, "in that the label then and there bore statements, designs, and devices regarding the said article and the ingredients and the substances contained therein, which were false and misleading, in that the words 'Peroxide Cream' represent that peroxide is an important ingredient, and tend to lead the purchaser to believe that peroxide is an important ingredient of the article, whereas, in truth and in fact, the article then and there contained only an indication of a very small quantity of same peroxide which said quantity is insignificant."

The scope of the general terms of the definition of misbranding in section 8, "any statement, design or device regarding such article, [389] or the ingredients or substances contained therein which shall be false or misleading in any particular," must be ascertained by construing them in connection with the subject-matter and other provisions of the act. It includes, in the first place, not only statements

¹ Numbers in brackets refer to pages of Federal Reporter.

concerning the ingredients or substances contained in the article, but certain other statements "regarding such articles." What such statements are appears in the case of drugs in the paragraph immediately following the definition of misbranding; for instance, drugs in imitation of or offered for sale under the name of another article. The only possible ground for doubting this construction arises from the manner in which the general definition of the term misbranding is followed, in the case of drugs, by specifications which purport to be additions. The remainder of section 8, dealing with the case of food, is perfectly clear. The first three paragraphs specify the particulars other than statements regarding the ingredients or substances contained therein which shall be deemed misbranding, and then follows the general provision covering any statement "regarding the ingredients or the substances contained therein which shall be false or misleading in any particular." Having regard to the fact, however, that the general definition of the term "misbranded" is expressly applicable to both food and drugs, it does not appear that the difference in phraseology and form of arrangement of the specific provisions for the two articles affects their substantial equality in scope. It is clear that the section does not apply to any statement regarding a drug which does not have reference to the ingredients or substances contained therein, or to any of the particulars specified in the section in the case of drugs. The same process of reasoning discloses the scope of the phrase "false or misleading in any particular." If there is any appreciable difference in the import of the words false and misleading, the scope of the latter term is to be found in the specific provisions of this section in the case of drugs; for instance, where the label fails to state, as required, the quantity or proportion of alcohol contained therein. No statement regarding a drug can therefore be false or misleading in any particular, within the meaning of the act, unless it relates to some one or more of the various particulars expressly enjoined or prohibited by the act.

It appears upon the face of the information that the preparation in question contained some peroxide. There was no statement on the label as to the quantity or proportion, nor does the act require any such statement in the case of peroxide. Certainly, then, the label was not false. In *re Wilson* (C. C.), 168 Fed. 566; *United States v. Boeckmann* (C. C.), 176 Fed. 382. But the information alleges that the label is "false and misleading, in that the words 'Peroxide Cream' represent that peroxide is an important ingredient, and tend to lead the purchaser to believe that peroxide is an important ingredient of the article, whereas, in truth and in fact, the article then and there contained only an indication of a very small quantity of same peroxide, which said quantity is insignificant." It is asserted (and it is a fair inference) that the label tends to lead purchasers to believe that peroxide is present to such an extent that the antiseptic and healing qualities of peroxide may be obtained from its use; and it is argued that [390] such is not the fact, and therefore the label is misleading. In other words, the Government contends that the statement on the label with reference to the remedial effect of the article is a misbranding within the meaning of the act because the article is, in fact, ineffectual for the purpose indicated. Assuming that the information is sufficient as a pleading to raise such an issue,

this contention is based upon an entire misconception of the scope and purpose of the act. The purpose was to protect the public against deception in the purchase of drugs and food by punishing adulteration and misbranding as therein defined. If the label on a drug is not false or misleading in any of the particulars enjoined or prohibited by section 8, no offense is committed under that section. By no possible construction can the terms of the act be extended to such a boundless field of inquiry as that involved in the accuracy of the remedial effects claimed for a drug. Such an inquiry could be pursued only through the opinions of contending experts and the experience of those who had used the article, and a conclusive determination could seldom, if ever, be reached. At all events, it is sufficient to say that the act discloses no purpose to hold manufacturers and vendors of preparations like the one in issue here to criminal responsibility for misstatements as to their curative or remedial effects. *United States v. Johnson* (D. C.), 177 Fed. 313.

The second count of the information alleges that there was enclosed with the article a circular entitled "A. D. S. Toilet Dainties," containing the following words, under the heading "A. D. S. Peroxide Cream": "It is a pure skin cerate, in which a harmless and efficient whitening agent has been successfully incorporated"; and asserts that this was a misbranding "in that the circular accompanying the article bore statements, designs and devices regarding the said article, and the ingredient and substances contained therein, which were false and misleading, in that the statement 'is a pure skin cerate' is false and misleading in that it represents the article to contain wax, whereas, in truth and in fact, the said article did not then and there contain wax, and was not then and there a cerate." In other words, the information shows that the alleged false and misleading statement constituting misbranding appeared, not upon the label of the article itself, or upon the package in which the article was contained, but upon a separate circular (the title of which indicates that it advertised other articles) which was enclosed with the article in the enveloping package.

The terms brand and label as used in this connection are perfectly clear and definite; they indicate a statement, design or device affixed to an article. Confusion can only arise from the failure to employ uniform phraseology throughout the different paragraphs of section 8 to express the same idea. In the second numbered paragraph relating to food the phraseology is "if the package fail to bear a statement on the label"; in the fourth numbered paragraph relating to food the phraseology is, "if the package containing it or its label shall bear any statement." Doubtless these variations in expression were employed in view of the fact that such articles are commonly sold either in bottles, jars or cans, in which case the statement, design or [391] device would ordinarily appear on a printed label attached thereto, or in an enveloping carton or package, when the statement would ordinarily be printed on the package. But the clearest provision in the section (the third numbered paragraph relating to food) omits the word label altogether: "If in package form, and the contents are stated in terms of weight or measure they are not plainly and correctly stated on the outside of the package." The plain sense of the language in question is that

it embraces any statement, design or device regarding the article, which appears on the outside of the package in which the drug is offered for sale, whether such statement be printed upon or otherwise affixed to the package itself or impressed upon a separate label which is then affixed to the package. An advertising circular enclosed with an article inside the carton in which it is offered for sale, does not induce the sale or deceive the intending purchaser, and is not within the purview of the act.

The demurrer is sustained.

UNITED STATES v. 10 BARRELS OF VINEGAR.

(District Court, E. D. Wisconsin, April 19, 1911.)

186 Fed. 399; N. J. No. 1050.

Distilled vinegar to which a small quantity of pure boiled apple cider had been added for coloring, and which was labeled "Saratoga Brand Vinegar, a blend of pure boiled apple cider and distilled vinegar," held misbranded as misleading the public to believe that it was composed of pure boiled apple cider vinegar and distilled vinegar.

Libel under section 10 of the Food and Drugs Act. On demurrer to libel. Demurrer overruled. Decree of condemnation and forfeiture taken pro confesso.

[400]¹ This is a case arising under the pure food act, so called. A demurrer has been interposed to the libel, which raises the question whether the vinegar in question was misbranded, under the terms of section 8 of said act, which provides substantially that the term "misbranded" as used in the act, shall apply to all drugs or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design or device; regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular, etc.

The vinegar in question was labeled as follows: Gal. Established 1875. Dayton, O. We warrant our vinegar to test 40 grains in strength B. T. Chandler & Son, 27 East 55th Street, Chicago. Manufacturers and Wholesale Dealers in Saratoga Brand Vinegar. A blend of pure boiled apple cider and distilled vinegar. We guarantee the Vinegar sold under our brand to comply with the requirements of the national and State pure food laws. For ———.

DECISION OF COURT ON DEMURRER.

QUARLES, *District Judge* (after stating facts as above). The contention of the Government is that the label is so framed as to mislead the average customer who reads the same casually. The eye naturally rests upon the words in large print "Saratoga Brand Vinegar," then in smaller type "Pure Boiled Apple Cider," and in the third line, in larger print "Distilled Vinegar." [401] Without the aid of marks of punctuation, it is contended that the words "A blend of Pure Boiled Apple Cider and Distilled Vinegar" may naturally describe

¹ Numbers in brackets refer to pages of Federal Reporter.

two brands of vinegar that are blended, and the words "Pure Boiled Apple Cider" are merely descriptive of one of such ingredients.

It is a matter of common knowledge that cider vinegar is far superior to distilled vinegar. The popularity of cider vinegar is so general that this brand, not subjected to critical examination, would naturally arouse the expectation that cider vinegar has been blended with distilled vinegar. That, like the Delphic oracle, the label, in the absence of punctuation, may be read either way, and the average buyer might naturally be misled in the premises.

If, as matter of first impression, the label naturally conveys the idea that cider vinegar is one of the ingredients, then it is calculated to deceive, although a deliberate reading of the label might correct such impression. It is matter of common observation that the average retail purchaser of such commodities does not delay to make a careful analysis of the label, but contents himself with a hasty glance or cursory examination. If therefore, this label would lead such purchaser at first blush to the conclusion that here was a blend of two vinegars, one of which was cider, it would fall within the definition of "misbranding" under section 8. In other words, the ordinary purchaser reading this label, would not be led to suppose he was buying distilled vinegar compounded with a foreign element. He is comforted with the assurance "We guarantee the Vinegar sold under our brand to comply with the requirements of the National and State Pure Food Laws."

There is another subdivision of the pure food act which must be considered *pari materia* with the clause already under consideration, section 8, subdivision 4, paragraph 2, is in substance as follows. An article of food which does not contain any poisonous or deleterious ingredients shall not be deemed misbranded if labeled, branded or tagged so as to plainly indicate that they are compounds, imitations or blends, and the word "compound" "imitation" or "blend" as the case may be, is plainly stated on the package in which it is offered for sale. Up to this point the label in question conforms with the act and, if legislative conditions ended here, there could be no just cause of complaint. But Congress added another requirement in the case of a blend—"provided that the term blend as used herein shall be construed to mean a mixture of like substances" etc. If the substances so blended are not similar, the statement on the label that they are blended is not sufficient to secure immunity.

The defendants contend that this restrictive proviso applies only where the blend is claimed without disclosure of ingredients, and has no application where as here, the component parts of the blend are disclosed. This construction seems to be too narrow. One prime object of this legislation is to prevent the public from being misled or deceived. In view of the language of the act we are justified in saying that the term "blend" as here displayed on the label, is an assurance to the public that the mixture consists of like substances; and in the present case it is an assurance that the "Saratoga Brand Vinegar" [402] consists of two like substances, that is, distilled vinegar and a vinegar derived from apple cider. In this regard the label is false and misleading.

We have seen how naturally the buyer might be misled by a casual examination of the label. The use of the term "blend" coupled

with a specific reference to the pure food act, is well calculated to confirm such mistake, in view of the guaranty that the vinegar sold under this brand meets all the requirements of the national pure food law. Special significance is thus given to the statutory definition of the term "blend." It is true that boiled apple cider might be used as a harmless agent to give color or flavor to the distilled vinegar; but in such a case the boiled cider would be an infusion as distinguished from a "blend," and the public would be entitled to notice of its use for that qualified purpose. Here it is presented to the public as a blend, which is falsely misleading, because it is conceded that no cider vinegar whatever is contained in these packages.

Defendants cite in support of their contention, *In re Wilson* (C. C.), 168 Fed. 556; *United States v. Boeckmann* (C. C.), 176 Fed. 382; *United States v. 68 cases of Syrup* (D. C.), 172 Fed. 782.

The *Wilson* case is not in point, because there the substances comprising the "Gold Leaf Syrup" were both like substances, and under the terms and provisions of the act could properly be blended. The ingredients were maple and white sugar, and it is apparent that there was no misbranding in that case.

In the *Boeckmann* case, *supra*, the product was labeled "Compound" "Pure Comb and Strained Honey and Corn Syrup." It will be observed the representation in that case was that it was a compound, as distinguished from a blend. So that has no bearing on the instant case.

In *United States v. 68 Cases of Syrup*, *supra*, the court treated the extract of maple wood as a saccharine substance which might be blended with refined cane sugar, and that they constituted a blend within the meaning of the act. In the case at bar, we have no two similar substances, but only one substance, namely, distilled vinegar, which has been mixed with a product wholly unlike distilled vinegar. While the reasoning in that case is not satisfactory, a careful examination will show that it does not rule the instant case.

The Government cites the case of *United States v. Scanlon* (D. C.), 180 Fed. 485. This is a very interesting and well-reasoned case and goes far to sustain the conclusion we have already reached in this case. The defendant in that case manufactured syrup of cane sugar flavored to imitate maple syrup by the introduction of an extract from maple wood after it had been chopped down. The syrup was put up in bottles labeled "Western Reserve Ohio Blended Maple Syrup." The words "Ohio" and "Maple Syrup" had between them the word "Blended," and then in small type the statement, "This syrup is made from the sugar maple tree and cane sugar." The court held that the label was misleading, in that purchasers would ordinarily understand that the article contained in part maple syrup made from the sap drawn from live maple trees, and therefore the article was misbranded.

[403] I am constrained to hold that the vinegar in this case was misbranded within the meaning of the pure food act, and therefore the demurrer will be overruled, with leave to respondent to answer within twenty days if so advised.

UNITED STATES v. 74 (OR 20) CASES OF GRAPE JUICE.

(Circuit Court of Appeals, Second Circuit, May 8, 1911.)

189 Fed. 331; N. J. No. 1045.

In proceedings for violation of the Food and Drugs Act, whether criminal or in rem, when the violations are reported by the U. S. Department of Agriculture, the notice to the person from whom the sample was taken and the hearing provided for in section 4 of the act are necessary conditions precedent to prosecution.¹

Appeal from a decree of the District Court, Western District of New York, entered upon the verdict of a jury, rendered in accordance with the direction of the court, in proceedings instituted by the United States for the condemnation, as being adulterated and misbranded, of 74 cases of grape juice, under the provisions of the Food and Drugs Act. Affirmed.²

[332]³ It was stipulated upon the hearing of the appeal in this court that the proceedings were instituted by the district attorney for the western district of New York, solely upon and by reason of a report made to him by the [333] Secretary of Agriculture of a violation of said act. It was also conceded that the steps prescribed in section 4 of said act with respect to notice and hearing had not been taken as a basis for the report made by the Secretary of Agriculture. The district judge ruled that it was a condition precedent to the institution of proceedings under section 10 of the act upon a report from the Secretary of Agriculture that said steps prescribed in section 4 should have been taken and, consequently, directed a verdict for the respondents.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, *Circuit Judge* (after stating the facts as above). The different sections of the Food and Drugs Act while relating to different subjects are consistent and, in many respects, interdependent. The second section—the relevant portions of which have been shown—provides that any person violating the provisions of the act shall be guilty of a misdemeanor and subject to fine and imprisonment. The tenth section provides that articles sold or transported in violation of the provisions of the act shall be liable to seizure and condemnation. Both sections relate to penalties for violations of the act. The penalty under one section is a fine and imprisonment. The penalty under the other section is the forfeiture of the misbranded or adulterated goods. Both sections are penal in their nature. Punishment is as well inflicted by the forfeiture and loss of property as by a fine. The two sections taken together (with the first section which relates to manufacture in territories) cover the subject of the punishment imposed for breaches of the provisions of the statute.

Section 5 of the act must also be read in connection with sections 2 and 10. The latter, as we have seen, relate to penalties. The former provides for the enforcement of such penalties. It makes it the duty

¹ Contra, *United States v. Morgan et al.*, p. 494, *post*.

² Affirming *United States v. 74 Cases of Grape Juice*, p. 303, *ante*.

³ Numbers in brackets refer to pages of Federal Reporter.

of the proper district attorney upon the presentation of "satisfactory evidence" of a violation of the act by any State health or food officer to cause appropriate proceedings to be instituted and prosecuted. It also provides that the district attorney shall institute such proceedings in case the Secretary of Agriculture shall report to him any violation of the act. But in this case it is not required that evidence of a violation of the act shall be presented. The report of the Secretary is in itself made the basis of proceedings.

Now if section 5 stood apart from other provisions of the statute it would contravene a practice so long and well established as almost to amount to a fundamental right, viz: that proceedings for the punishment of the citizen should be instituted only after investigation by some public official. To compel a district attorney to institute proceedings upon the report of another official without requiring the latter to investigate before making such report would be most extraordinary. And this act does not so require. It is made the duty of the district attorney to act upon the report of the Secretary of Agriculture without the presentation of evidence required in other cases only because section 4 of the act throws the duty of making investigation upon the Secretary before he makes his report. The preliminary [334] examination in such case is made by the Secretary instead of the district attorney. The sections are interdependent and must be read together, and when so read they are found to present an orderly and a just procedure. As then the "report" of the Secretary of Agriculture referred to in section 5 is the certificate of facts which he is required to make under section 4, it necessarily follows that the steps required to be taken preliminary to certifying the facts—including notice and hearing—must be taken before such a report as the law requires can be made. And it also follows, upon principles already considered, that when such report is at all a prerequisite to proceedings under section 5, it is as necessary to proceedings for the enforcement of penalties by way of forfeiture as by way of fine or imprisonment.

Looking at the question involved from a slightly different point of view the same conclusion must be reached. Section 4 of the act—as we have seen—provides for the examination of articles by the Bureau of Chemistry of the Department of Agriculture for the purpose of determining whether they are adulterated or misbranded. If they are found to be adulterated or misbranded notice and an opportunity to be heard must be given to the party from whom they were obtained. If it then appears that the act has been violated the Secretary of Agriculture must certify the facts to the proper district attorney. This is the only report of the violation of the act which the statute requires the Secretary to make. When made it affords, without further investigation, the basis for the institution by the district attorney of appropriate proceedings for the enforcement of the penalties prescribed in the act. But it is just as necessary that the report which is the basis for the condemnation proceedings should be made according to law as it is that such report should be a lawful one when it affords the basis for a criminal prosecution.

It must be distinctly borne in mind that the requirement of a preliminary investigation including notice and hearing applies only when the district attorney acts upon the report of the Secretary of

Agriculture. It is not required when he acts upon evidence furnished by any State health officer and undoubtedly would not be required in proceedings taken at his own initiative.¹ Apparently the statute does not contemplate reports by the Secretary except when due examinations have been made, and leaves the ordinary cases requiring immediate prosecution or seizure to the action of local authorities. We perceive no ground whatever for the contention of the Government that if its position in this case be not sustained, section 10 of the act may as well be treated as a dead letter.

[335] We are aware that decisions have been rendered in several district courts contrary to the conclusions reached in this opinion. It is sufficient to say that the reasoning of those cases does not commend itself to our approval and that we are unable to follow them.

The decree of the district court is affirmed.

UNITED STATES *v.* HYGIENIC HEALTH FOOD CO.

(District Court, N. D. California, May 12, 1911.)

N. J. No. 1265.

Indictment charging misbranding of an article labeled "Grant's Hygienic Crackers," held not to state an offense under the Food and Drugs Act.

Indictment alleging violation of section 2 of the Food and Drugs Act. On demurrer to indictment. Demurrer sustained.

[2] DE HAVEN, *District Judge*. The indictment charges that the defendant upon a date named, shipped from the Northern District of California, to one J. P. Watson, at El Paso, Texas, five cases, labeled:

"Grant's Hygienic Crackers," which were then and there intended as an article of food. That each package in each case was then and there misbranded under the provisions of the Food and Drugs Act of June 30, 1906, section 8 thereof, in that it contained false and misleading statements, for the following reasons: The label on each package in each of the five cases aforesaid bore the following inscription: "Sold in Packages only Grant's Hygienic Crackers No predigested stuff are they But solid food for work or play Just read what leading doctors say of Grant's Hygienic Crackers for Constipation, Indigestion, Dyspepsia and Sour Stomach. Ideal food for general family use A daily regulator A week's trial will convince you Eaten daily in place of bread will keep the system in perfect order. Recommended & prescribed by leading physicians & dentists. Manufactured by the Hygienic Health Food Co., Inc., Berkeley, Cal. Sold in Packages only."

The indictment then charges—

that whereas in truth and in fact, the said so-called Hygienic Crackers consist largely of wheat and do not, and did not contain any ingredients possessing therapeutic properties for the cure of such diseases as are mentioned in the aforesaid label, other than those possessed by ordinary wheat, and the said statements are calculated to mislead the purchaser into the belief that the said crackers are in fact possessed of rare medicinal properties unwarranted by the composition of the said crackers.

¹ It is not necessary to be determined in this case whether section 5 of the act in any way limits district attorneys in their right as the prosecuting officers of the United States to institute criminal proceedings or proceedings in rem when satisfied by satisfactory evidence obtained from other persons than health officers that the provisions of the act have been violated; and nothing in this opinion is to be considered as holding that the proceedings in this case could not have been taken by the district attorney as the result of his own investigation. Our opinion is based wholly upon the stipulation that the district attorney acted altogether in pursuance of the report of the Secretary of Agriculture.

The defendant has demurred to this indictment upon the ground that it does not state an offense under section 8 of the act of June 30, 1906, and I am of the opinion that the demurrer must be sustained.

Subdivision 4 of section 8 of the act referred to in the indictment provides that an article of food shall be deemed to be misbranded—

if the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

First: In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

[3] I think the indictment may be fairly construed as alleging that the packages therein mentioned contained articles of food known as Grant's Hygienic Crackers, and there is no averment that such described crackers contained any poison or deleterious ingredient; and in my opinion such an averment is necessary to charge an offense where the label upon the package containing an article of food states where it was manufactured or produced, and describes such food by its own distinctive name without stating the ingredients of which such article of food is composed.

The demurrer is sustained.

UNITED STATES v. 100 PACKAGES ANTIKAMNIA TABLETS.

(Supreme Court, District of Columbia, November 18, 1910; and Court of Appeals, District of Columbia, May 29, 1911.)

N. J. No. 1056; 37 App. D. C. 343.

A drug product containing acetphenetidin *held* not misbranded because the label failed to bear a statement that the acetphenetidin contained therein was a derivative of acetanilid, and because of the statement on the label that it contained no acetanilid.¹

Libel under section 10, Food and Drugs Act. On exceptions to the libel, filed by the Antikamnia Chemical Co., claimant. Exceptions sustained. Libel dismissed.

Decision of the Supreme Court of the District of Columbia, on exceptions to libel.

[2]² CLABAUGH, *Chief Justice*. Now, gentlemen, in accordance with the views stated to counsel here, the opinion of the court is sought purely as to the question whether or not, under this Food and Drugs Act, it is essential, where any of the drugs, and more particularly in this case, acetanilid, is used—whether it is essential to place upon the label not only the name of the derivative of the parent drug, but also a further statement upon the label that it is the derivative of the parent drug. That is really the question at issue. In other

¹ Reversed, *United States v. The Antikamnia Chemical Co.*, p. 684, *post*.

² Numbers in brackets refer to pages of Notice of Judgment.

words, in this case the label bore the name of this acetphenetidin, and was labeled correctly, so far as the amount of it contained in the package is concerned, the only question being whether it ought further to have stated that it is the derivative of acetanilid, or words to that effect, and the question therefore arises whether or not the label in the case contains all that is sufficient under this act.

Now in this case the Government has libeled the various packages, upon the theory that the law requires, in conjunction with the regulations of the three Secretaries, the further statement of the fact that it is the derivative of this acetanilid.

Now a good deal of the argument in this case was spent upon the question as to whether or not the act in question was a penal statute, or merely a remedial one; that is: was it a quasi-criminal act, or purely a remedial act?

The only question here, in my judgment, is this: Does the act under which these proceedings have been taken, require the statement, where the name of the derivative is given—does that act require the further statement placed upon the label that it is the derivative of some given drug mentioned in this given section of the act; in this case, of acetanilid? Now the act specifies these various drugs that are mentioned in this particular section, and to read that portion of it that is material, it seems to me, the law says: "Or, second: If the package fail to bear a statement on the label of the quantity or proportion of any alcohol * * * or acetanilid, or any derivative, or preparation of any such substance contained therein." Now the act further provides that these three Secretaries shall have the right to make all needful and necessary regulations for the purpose of carrying into effect this act. Now, in that view of the case, the respective Secretaries mentioned in the act did provide regulations, which regulations said, among other things, that it was essential for the manufacturers to place upon the label the derivative, and to show not only that it was a derivative, but shall further add to that the drug from which it is a derivative; in other words, the parent thereof. Is it within the scope of the authority of these Secretaries, therefore, to add regulations compelling that addition, or is that legislation upon their part, and therefore beyond the scope of their right or authority?

Now I have spent a good deal of time, gentlemen, in considering this case. Everyone, I suppose, at least the general public is disposed to regard this act as of great benefit and use to the public, and it ought to be upheld in every particular, if it is possible so to do. Now briefly stating what is conceded in the brief of the Government, and fairly conceded, and to which there can be no dispute, and that is, that the Secretaries cannot add anything to the law, that is, make an addition to an act that has already made its provisions; they cannot provide anything that will become an additional law in the construction of that act. So that it is a pretty narrow question, and one that, it seems to me, is not so much a question of authority, as purely a question of interpretation of this act.

Now conceding, for the purposes of the statement of this case, that this is not a quasi-criminal statute, but is purely a remedial one. If that be true, [3] then it is the duty of the court to so construe it as will give effect to the purposes and objects for which it was passed,

and I have no doubt that the Secretaries could, with the same propriety, make regulations that would the more effectually carry into execution the purpose and intent of the law makers. That being so, what is the fair construction of the act, and does it not need interpretation? Now the right to interpret an act in conformity with the purposes and object of that act simply means that where the act itself is not perfectly clear, then they can give such an interpretation to it as will carry out and gratify the purposes of its passage.

An interpretation does not, as I understand it, mean that you can add anything to language which is plain. If there is anything about the language of a statute which annuls the purposes of that statute, then you have the right to interpret according to its purposes, if there be the slightest doubt about the words of the act; but if the act is plain, and the words present no difficulty, then, it seems to me, you cannot interpret or put something else in, because, perhaps, it would have been plainer or broader in its effect than the simple words of the act. I do not mean that you have got to indulge in the interpretation of the letter of the law, but the spirit, of course; otherwise we would have a very exceedingly narrow condition concerning the law. We must always interpret by the spirit of the law. What does this law say? Reading it again: "Or, second, if the package fail to bear a statement on the label of the quantity or proportion of any acetanilid, or any derivative or preparation of any such substances contained therein." Now if it fails to state that it is acetanilid, if it fails to state that it is a derivative, that is, the name of anything derived from acetanilid, if it fails to state what the name of that derivative is, then it brings it within the penalties of the act. Now, as I understand it, this label that they have on the packages states the name of the derivative—acetphenetidin is the name of the derivative which is stated upon there—and the amount that is contained in the package is likewise stated. Now what is to suggest that it should go any further? It is argued that the very title of the act implied the demand of something else, and that title is, from the libel by the Government, "An act for preventing the manufacture, sale, or transportation of adulterated, or misbranded, or poisonous or deleterious foods, drugs, medicines and liquors, and for regulating the traffic therein, and for other purposes." Now is it for the purpose of preventing the manufacture, sale etc.?

Now that is the purpose of it. It is to protect the community from being imposed upon by packages having one brand, when indeed the contents of them are entirely different from the character of brand that may be imposed upon anybody. It is suggested that it is likewise to prevent the drug habit, as it has been described in the argument, and it is to be gathered from the argument, as I understand, when the act was passed; so that at all events it is done for the protection of society, for the protection of the people, and when we come to the consideration of the act itself, we have the law stating that you shall truly brand, you shall truly label any article that you are selling. Now they are selling this acetphenetidin, and this package is branded as that. Now why, or what there is in the act which would say, or which would require to be stated that this acetphenetidin is the derivative of acetanilid, is certainly not apparent upon the face of either the title or the reasons for the act. When the court cannot

assume that the people generally are any more familiar with acetanilid than they would be with this acetphenetidin, how can the court say that, as a matter of law, one may be just as familiar with the statute as the other. The court cannot give its own personal views on the subject, that it knew more about this acetanilid than it did of these derivatives. The purpose [4] of the act is to state to the person who makes this drug that you must truly state to the people what it is. Now how can they be informed, unless the court takes judicial knowledge of something that it seems to me would be certainly doubtful, to say the least, that the people at large are any more familiar with one thing than the other? Furthermore, I don't see that it adds to it one way or the other, by labeling in this way, as it is suggested.

It would be very much more safe to a community, it seems to me, if the Secretaries who have the right to pass regulations for the carrying of this law into effect, had passed an act which said: Wherever the derivative of acetanilid is to be used—either acetanilid or its derivative—either the manufacturer shall place upon the label that it is a poisonous drug, or a dangerous drug, and that it should not be taken in doses of over five grains, say. Now that would effect the purposes of this act in a proper way; it would advise the people at large that acetphenetidin is a dangerous drug; that it ought not to be taken in doses of over five grains, say for illustration. That would give notice to the people that it was a dangerous drug, but would it be contended that under this act the Secretaries could force the placing of such a statement upon the label? Surely that would not be for the purpose of carrying into effect an act, but it would be adding legislation to the act, because it would be requiring something that the act did not require. For some reason or the other I would assume that the druggist or manufacturer who put these things up did not feel compelled to put these things on the label. It would be a good thing to protect the people, but unless some such suggestion was made in the act, how can the Secretaries, with the authority only to suggest regulations as would carry into effect the act—how can they undertake to say that in addition to what the law says, that he place upon the label from what parent drug it is derived? If they can say that, they can also say: You must put upon that label the statement of the character of the drug. That would manifestly be a positive addition to the law which requires the name of the drug to be placed upon the label, though such action on their part would be very much more effective to advise the people that it is a dangerous drug, than merely to say it is a derivative of acetanilid.

Now when this case was argued—and we are taking the whole argument together—it occurred to me that it was very similar to that decided by the Supreme Court of the United States in 166 U. S., in respect to the importation of stallions. Here, under the act, they were authorized to bring into this country from some place abroad, free of duty, any stallion, if it was for breeding purposes. That was the act. What was the reason of that? The reason was that it would improve the stock in this country. It could have had no other reason. Here you are allowed to bring foreign bred stallions into this country for breeding purposes, and the only reason for that would have been because the foreign-bred stallion was supposed to be

better, and would improve the breed of horses in this country. I cannot imagine any other reason. It was not certainly because we wanted more. That would be a useless thing, because we certainly had all of the character of the horse that we needed for breeding purposes, but it was manifestly for the purpose of improving the breed of horse in this country. Now, to carry out that purpose, the Secretary of the Treasury says: Here, inasmuch as this act is passed for the purpose of improving the breed of horse in this country, why we will, in accordance with our rights, make any necessary regulations to carry into effect that statute; we will pass a regulation that before you can bring him in, you must show that the stallion is of superior breed, and they refused to permit a stallion to be brought in until it was shown that it was of a superior character or breed of [5] horse. Now they refused, therefore, when the party to that cause sought to have this horse brought in without the payment of any duty. The Secretary says no, you have not shown him to be a superior breed, and the result was that it went to the Supreme Court of the United States, and the court says: The Secretary of the Treasury had nothing to do with it. The law says that any stallion could be brought in for breeding purposes; it did not say whether it should be superior or not. And consequently the court held that the Secretary had exceeded his rights; that he had added something to the law.

I have read the other cases, but that case seems to me to put into a nutshell the point of view that I am trying to impress here. I have read all the authorities suggested and some others, but it seems to me that it comes back to the simple question: Did this act need any interpretation, or was it perfectly plain, and if it needed such interpretation, could that interpretation add anything that Congress required to be done? Now this is the way that question seems to be answered here. I don't think the act needs any interpretation, because it is perfectly plain as to what it said, and evidently as to the purposes for which it was said. Then, from the other standpoint, if they have added anything to the law that should be placed upon that label, they have exceeded their rights. Now, in my opinion, they have added something. * * * Therefore, I think the exceptions in this case ought to be sustained.

From this decision the United States appealed to the Court of Appeals of the District of Columbia, where the judgment of the lower court was affirmed.¹

The opinion of the Court of Appeals follows:

SHEPARD, *Chief Justice*. This is an appeal by the United States from a judgment sustaining exceptions to, and dismissing a libel.

The libel prayed the seizure and condemnation of one hundred packages of a certain drug describing the same as follows:

Twenty packages, more or less, of said drug, labeled and branded as follows:

Antikamnia Tablets, Contain 305 grains of acetphenetidin, U. S. P. per ounce, Guaranteed by the Antikamnia Chemical Company, under the Food and Drugs Act, June 30th, 1906, U. S. Serial Number 10. The Antikamnia Tablets in this original ounce package contain no acetanilid, antifebrin, antipyrin, morphine, opium, codein, heroin, cocaine, alpha or beta eucaine, arsenic, strychnine,

¹ 37 App. D. C. 343.

chloroform, cannabis indica, or chloral hydrate. Antikamnia Tablets five grains. One ounce Antikamnia Tablets. Manufactured in the United States of America by the Antikamnia Chemical Company, St. Louis, U. S. A.

Also seventy other packages, more or less, of said drug, labeled and branded as follows:

Antikamnia and Codein Tablets. Contain 296 grains acetphenetidin, U. S. P. per ounce. Contain 18 grains suppl. codein per ounce. Guaranteed by the Antikamnia Chemical Company, under the Food and Drugs Act, June 30th, 1906, U. S. Serial No. 10. The Antikamnia and Codein Tablets in this original ounce package contain no acetanilid, antifebrin, antipyrin, morphine, opium, heroin, cocaine, alpha or beta-eucaine, arsenic, strychnine, chloroform, cannabis indica, or chloral hydrate. One ounce Antikamnia and Codein Tablets. Manufactured in the United States of America by the Antikamnia Chemical Company, St. Louis, U. S. A.

Also ten other packages, more or less, of said drug labeled and branded as follows:

Antikamnia and Quinine Tablets. Contain 165 grains acetphenetidin, U. S. P. per ounce. Guaranteed by the Antikamnia Chemical Company, under [6] the Food and Drugs Act, June 30th, 1906, U. S. Serial No. 10. The Antikamnia and Quinine Tablets in this original ounce package contain no acetanilid, antifebrin, antipyrin, morphine, opium, codein, heroin, cocaine, alpha, or beta-eucaine, arsenic, strychnine, chloroform, cannabis indica, or chloral hydrate. One ounce Antikamnia and Quinine Tablets. Manufactured in the United States of America by the Antikamnia Chemical Company, of St. Louis U. S. A.

The libel charges that the packages of said drugs are subject to condemnation as misbranded in violation of the provisions of the Food and Drugs Act, approved June 30, 1906.

Because each and all of said packages of drug contain a large quantity and proportion of acetphenetidin, which your libelant charges is a derivative of acetanilid, and that under the provisions of the said act of Congress and of the regulations lawfully made thereunder, it is provided and required that the label on each of said packages should bear a statement that the acetphenetidin contained therein is a derivative of acetanilid; and yet your libelant charges that each and all of said packages fail to bear a statement in any form that the acetphenetidin contained therein, is a derivative of acetanilid, or that the drug contains any derivative of acetanilid.

Your libelant further charges that each and all of said packages of drug are further misbranded in that the labels thereon are false and misleading, for the reason that each and all of the said labels bear the statement that no acetanilid is contained therein, and that said statement imports and signifies that there is no quantity or proportion of any derivative of acetanilid contained in said drug.

Under the warrant ordered to issue, the marshal seized ninety three packages, in all, bearing the labels aforesaid. By leave of the court, the Antikamnia Chemical Company, alleging itself to be the owner of the packages was permitted to appear as party defendant.

The exceptions on which the libel was dismissed are substantially: That the act does not require that the label on each of said packages shall have a statement that the acetphenetidin contained therein is a derivative of acetanilid, nor is it necessary under said act that a derivative of any parent substance should state that it is a derivative of such substance, provided the derivative itself is named by its proper name. That the statement on the packages that it contains no acetanilid is neither false nor misleading, but true, and the libel while charging that acetphenetidin is a derivative of acetanilid, does not charge that there is any acetanilid in acetphenetidin.

Section 1 of the Food and Drugs Act makes it unlawful to manufacture within any Territory, or the District of Columbia, an article

of food or drug which is adulterated or misbranded, "within the meaning of this act," and imposes a penalty therefor.

Section 2, prohibits the introduction into any State or Territory, or the District of Columbia, and the shipment from the same to any other State, Territory, etc., or foreign country, any article of food or drug, in the original packages, adulterated or misbranded within the meaning of this act, and the sale or offer for sale in the District of Columbia or Territories of any such adulterated or misbranded foods or drugs; and provides a penalty therefor.

Section 3. provides: "That the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this act, including the collection and examination of specimens of foods and drugs," etc.

Section 4 provides for the examination of foods and drugs, and the giving of notice if found to be adulterated or misbranded.

[5] Section 5 makes it the duty of the district attorney to whom report shall be made of any violation of the act, to cause appropriate proceedings to be commenced, without delay, for the enforcement of the penalties provided in the act.

Section 6 defines the meaning and inclusion of the terms drug and food.

Section 7 declares that for the purposes of this act an article shall be deemed to be adulterated:

In case of drugs:

First. If when a drug is sold under or by a name recognized in the United States Pharmacopœia, or National Formulary, it differs from the standard of strength, quality, or purity, as determined by the test laid down in the United States Pharmacopœia, or National Formulary, official at the time of investigation; *Provided*, That no drug defined in the United States Pharmacopœia, or National Formulary, shall be deemed to be adulterated under this provision if the standard of strength, quality or purity be plainly stated upon the bottle, box, or other container thereof, although the standard may differ from that determined by the test laid down in the United States Pharmacopœia, or National Formulary.

Second. If its strength or purity fall below the professed standard, or quality under which it is sold. [Other portions of the section relates to confectionery and foods.]

SEC. 8. That the term "misbranded" as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory or country in which it is manufactured or produced.

That for the purposes of this act an article shall also be deemed to be misbranded:

In case of drugs:

First. If it be an imitation of, or offered for sale, under the name of another article.

Second. If the contents of the package as originally put up shall have been removed in whole or in part, and other contents shall have been placed in such a package, or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein. [Remainder of section applies to foods.]

Section 9 relates to guaranties by wholesalers, jobbers and manufacturers.

Section 10 provides for the seizure and condemnation of adulterated or misbranded foods, drugs, and liquors through proceedings instituted for the purpose, which proceedings "shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of an issue of fact joined in any such case, and all such proceedings shall be at the suit of, and in the name of the United States."

Sections 11, 12 and 13, have no possible bearing on the questions involved.

Acting upon the recommendation of the commission of experts, the Secretaries of the Treasury, of Agriculture, and of Commerce and Labor, respectively, adopted certain rules and regulations for carrying out the provisions of the foregoing act, on October 17, 1906, and published the same.

Regulation 28 was amended to take effect on April 1, 1910. This states the derivatives of the several drugs enumerated in section 8 and names the several preparations containing them respectively. Derivatives of or from, and preparations containing acetanilide, are enumerated as follows:

Acetanilide (Antifebrine, Phenylacetamide).

Derivatives: Acetphenetidine, citrophen, diacetanilide, lactophenin, methoxyacetanilide, methylacetanilide, para-iodacetanilide, and phenacetine.

[8] Preparations containing acetanilide or derivatives: Analgesics, antineuralgics, antirheumatics, cachets, capsules, cold remedies, elixirs, granular effervescent salts, headache powders, mixtures, pain remedies, pills and tablets.

The regulation concludes as follows:

In declaring the quantity or proportion of any of the specified substances the names by which they are designated in the act shall be used, and in declaring the quantity or proportion of the derivatives of any of the specified substances, in addition to the trade name of the derivative, the name of the specified substance, shall also be stated, so as to indicate clearly that the product is a derivative of the particular specified substance.

1. A preliminary contention on behalf of the appellants is, that the act being remedial and not penal, should be liberally construed. This contention seems to be of little or no practical importance in the present case, as the substantial question presented is one of power rather than construction. Without discussion, therefore, it may be conceded that the act, while it contains penal provisions without which it could not be enforced, was enacted to remedy the great mischief resulting from the unrestricted sale of adulterated drugs and articles of food and ought to be given, where possible, a construction that will effect the general legislative intention.

2. The substantial questions for determination arise upon two propositions that have been submitted in support of the contention of error in the dismissal of the bill on the exceptions stated. The first of these is: That the packages of the drug are misbranded, because the labels fail to recite that acetphenetidine contained therein is a derivative of acetanilide.

It seems clear that this omission is not in express violation of the requirement of section 8 of the act, for the reason that the label states the true name of the drug—acetphenetidine, which, though not one

of those specifically named in the section, is a derivative of one of them—acetanilide.

Now, while persons skilled in chemistry and pharmacy would know that acetphenetidine is a derivative of acetanilide, it is certain that the average purchaser and user of drugs would not. For this reason, no doubt, the commission of expert chemists, whose recommendations were adopted by the three Secretaries, suggested the regulation requiring the label of a derivative of one of the drugs specified in section 8 to show not only the trade name of the same, but also the name of the substance of which it is a derivative. It is well settled that where an act of Congress has for its object the raising of revenue, the administration of the affairs committed to an executive department, as of the public lands, and the like, or the execution of the power over commerce, matters of detail looking to the promulgation of regulations for carrying the law into effect, as, for example providing for the proceedings thereunder, the fixing of standards, brands and labels, or the ascertainment of necessary facts upon which the law may operate, may be expressly delegated to an executive officer. In such instances Congress legislates on the subject as far as is reasonably practicable, and from the recognized necessities of the case is compelled to leave to executive officers the duty of bringing about the result pointed out by the statute. (*United States v. Bailey*, 9 Pet. 239; *United States v. Caba*, 152 U. S. 211; *In re Kollock*, 165 U. S. 526; *Field v. Clark*, 143 U. S. 470; *Union Bridge Co. v. United States*, 204 U. S. 364; *St. L. & I. M. Ry. Co. v. Taylor*, 210 U. S. 281; *Bong v. Campbell Art Co.*, 214 U. S. 236; see also *Coopersville Co-operative Creamery Co. v. Lemon*, 163 Fed. 145; *Prather v. United States*, 9 App. D. C., 82; *Kollock v. United States*, 9 App. D. C., 420.)

On the other hand, it is equally well settled that the power conferred to make regulations for carrying the law into effect must be exercised within the powers [9] delegated, that is to say, confined to details for regulating the mode of proceeding to carry into effect the law as it has been enacted by Congress. It cannot be extended to amending, or adding to the requirements of the act itself. (*Morrill v. Jones*, 106 U. S. 466; *U. S. v. Symonds*, 120 U. S. 46; *U. S. v. Eaton*, 144 U. S., 677; *Williamson v. United States*, 207 U. S. 425.)

The decisions cited mark the general boundary line between the powers that may be delegated to administrative officers and those that may not be. It remains to determine on which side of that line the power claimed in the present case falls.

It must be borne in mind that the Food and Drugs Act does not confer upon executive officers the power to prescribe the forms of brands and labels upon drugs, as was done by the oleomargarine act, that was considered in *Kollock's Case*, *supra*. The only power conferred is that, in section 3, which provides that the three Secretaries named, "shall make uniform rules and regulations for the carrying out of the provisions of this act, including the collection and examination of specimens of food and drugs," etc. * * *

Section 8 declares when an article shall be deemed to be misbranded: "First: If it be an imitation of, or offered for sale under the name of another article." "Second: If (among other things) the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha

or beta eucaïne, chloroform, cannabis indica, chloral hydrate, or any derivative or preparation of any such substances contained therein."

In so far as the regulation designates the several derivatives of the drugs enumerated in section 8, and the preparations containing the same, we are of the opinion that it is within the power conferred in section 3 to make uniform rules and regulations for carrying out the provisions of the act. It was not reasonably practicable for Congress to ascertain and declare these several derivatives and preparations, which might then have existed, much less to anticipate those, which might later come into existence and use. Having declared that the quantity or proportion of the several derivatives of the named drugs shall be stated on the labels, the ascertainment of such derivatives was a matter of detail properly confided to the executive officers in carrying out the provisions of the law. The regulation having named acetphenetidine as a derivative of acetanilide, the manufacturer complied therewith to the extent of naming the proportion of said derivative contained in the antikamnia tablets, but did not comply with the requirement of the same that it should also recite that it was, in fact, a derivative of acetanilide. The last requirement was, in our opinion, an amendment of, or an addition to the act itself, and therefore beyond the powers of the executive authority. Congress reserved to itself the statement of the contents of the labels and did not require that when a drug was a derivative, merely, the name of the drug from which derived should also be recited. Had it intended that this should be done, it would have so declared distinctly. In this respect the case is clearly differentiated from *In re Kollock*, supra, and comes within the rule governing the second class of cases before recited, including *United States v. Eaton*, 144 U. S. 677-688; and *Williamson v. United States*, 207 U. S. 425-462. In the case last cited, the question was whether a false oath made in final proof required by a regulation of the Commissioner of the Land Office constituted perjury. The statute made certain requirements in regard to preliminary proofs and reiterated some of them in the section relating to final proofs, but omitted the one, which by the regulations made by the commissioner under the power conferred by the act to give effect to its provisions, was required. It was held that the power to adopt rules and regulations for the enforcement of the act could not be construed to warrant one that was in fact an addition to the act.

[10] Since the submission of this case, the Supreme Court of the United States has rendered a decision, the opinion in which, delivered by Mr. Justice Lamar, clearly draws the line between those powers which may be delegated by Congress to an executive officer and those which may not. *United States v. Grimaud*, May 1, 1911 [220 U. S. 506].) That was an indictment for violating a regulation of the Secretary of Agriculture relating to the use and occupancy of public forest reservations. It was said that in the nature of things it was impracticable for Congress to provide regulations for the various and varying details of management of the forest reservations, and that it was within its power to authorize the Secretary to make such regulations as would secure the objects of such reservation, namely, to regulate the use and occupancy and preserve the forests from destruction. Having so done, it declared that "Any violation of the

provisions of this act, or such rules and regulations shall be punished as provided in section 5388, R. S., as amended." The violation of such reasonable rules and regulations is "made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixes the penalty." It is this feature of the act that differentiated the case from *Williamson v. United States*, supra, and other cases cited, which, in our opinion, furnish the rule of determination for the case at bar. Congress here prescribed what the labels should contain, and conferred no power upon the Secretaries to make a regulation adding anything thereto.

3. The second proposition is this in substance: the statement on the label that the drug "contains no acetanilide," is false and misleading, and constitutes misbranding within meaning of the act. The libel does not expressly charge that acetphenetidine contains acetanilide. If it did, there would be no doubt of the soundness of the proposition, for the exceptions necessarily admit every fact plainly alleged. But it contains no such allegation. The charges that the labels are false and misleading "for the reason that each and all of said labels bear the statement that no acetanilide is contained therein, and that said statement imports and signifies that there is no quantity or proportion of any derivative of acetanilide contained in said drug." It is argued in support of the proposition that acetphenetidine, necessarily contains some appreciable quantity or proportion of the later drug; and it is further argued that this is a matter of common knowledge of which the court may take notice without proof. We cannot agree that it is a matter of common knowledge that a chemical derivative necessarily contains, or is of the same nature as the substance whence it may be derived. It was stated on the argument, without dissent, that very many well known substances, including acetanilide, are derivatives of benzene, or benzol. Some of these derivatives are noxious, others entirely harmless. While, therefore, acetphenetidine is a chemical derivative of acetanilide, and may be derived therefrom in practice, it is in a general sense a derivative of benzene or benzol, and may, for all we know, be derived therefrom in actual practice for commercial use. When one wishes to ascertain the common meaning or signification of a word, resort is ordinarily had to the accredited dictionaries of the language. Murray's English Dictionary defines a chemical derivative thus: "A compound obtained from another, e. g., by partial replacement." The definition of the Standard Dictionary is substantially the same. In the latest edition of Webster's International Dictionary the following definition is given: "A substance so related to another substance by modification or partial substitution as to be regarded as derived from it, even when not obtainable from it in practice." These definitions do not carry us very far. About as far as common knowledge goes is that chemical changes occur in substances through the subtraction or the addition of some particular element. Sometimes the mingling of several substances having chemical affinities, but respectively innocuous, may produce a deadly poison. And sometimes the subtraction of an element from a poisonous substance may produce another that is perfectly harmless. The principles that direct these combinations and control the transformations affected are beyond common knowledge. They can

only become known through the special study of the science of chemistry.

Whether, then, the addition or subtraction of elements through which acetphenetidine may, in theory or in practice be derived from acetanilide, produces such a chemical change of substance that it may be truly said to contain no acetanilide; or produces a substance which still contains an appreciable quantity or proportion of the same, presents a question of fact, which in our opinion, must be determined on the evidence of witnesses skilled in the science of chemistry.

To authorize the introduction of evidence an issue must be raised in the pleadings.

As before pointed out, the libel does not charge that the statement that the preparation contains no acetanilide is false, by reason of the fact that acetphenetidine does contain acetanilide. It carefully confines itself to the allegation that the statement is false because it does not recite that there is no quantity or proportion of any *derivative of acetanilide* contained therein. This clearly limits the charge of misbranding to the failure to state that acetphenetidine is a derivative of acetanilide. This is but another form of the complaint that the regulation has been violated. It does not raise an issue of fact as to whether acetphenetidine actually contains a perceptible quantity of acetanilide.

In accordance with these conclusions, the judgment will be affirmed.

UNITED STATES v. JOHNSON.

(United States Supreme Court, May 29, 1911.)

221 U. S. 488; N. J. No. 1058.

Held that statements on the labels of bottles of medicine to the effect that the contents are effective as a cure for cancer, even if misleading, do not constitute misbranding within the meaning of the Foods and Drugs Act.¹

In Error to the District Court of the United States for the Western District of Missouri. Affirmed.²

The facts are stated in the opinion.

[495]³ Mr. Justice HOLMES delivered the opinion of the court.

This is an indictment for delivering for shipment from Missouri to Washington, D. C., packages and bottles of medicine bearing labels that stated or implied that the contents were effective in curing cancer, the defendant well knowing that such representations were false. On motion of the defendant the district judge quashed the indictment (177 Fed. 313), and the United States brought this writ of error under the act of March 2, 1907, c. 2564, 34 Stat. 1246.

The question is whether the articles were misbranded within the meaning of section 2 of the Food and Drugs Act of June 30, 1906, c. 3915, 34 Stat. 768, making the delivery of misbranded drugs for shipment to any other State or Territory or the District of Columbia

¹ But see Amendment of Aug. 23, 1912, p. 14, *ante*.

² United States v. Johnson, p. 238, *ante*, affirmed.

³ Numbers in brackets refer to pages of U. S. Reports.

a punishable offense. By section 6 the term drug includes any substance or mixture intended to be used for the cure, mitigation or prevention of disease. By section 8, c. 3915, 34 Stat. p. 770, the [496] term misbranded

shall apply to all drugs, or articles of food, * * * the package or label of which shall bear any statement, design or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced. * * * An article shall also be deemed to be misbranded: In case of drugs: First. If it be an imitation of or offered for sale under the name of another article. Second. [In case of a substitution of contents,] or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein.

It is a postulate, as the case comes before us, that in a certain sense the statement on the label was false, or, at least, misleading. What we have to decide is whether such misleading statements are aimed at and hit by the words of the act. It seems to us that the words used convey to an ear trained to the usages of English speech a different aim; and although the meaning of a sentence is to be felt rather than to be proved, generally and here the impression may be strengthened by argument, as we shall try to show.

We lay on one side as quite unfounded the argument that the words "statement which shall be misleading in any particular" as used in the statute do not apply to drugs at all—that the statements referred to are those "regarding such article," and that "article" means article of food, mentioned by the side of drugs at the beginning of the section. It is enough to say that the beginning of the sentence makes such a reading impossible, and that article expressly includes drugs a few lines further on in what we have quoted, not to speak of the reason of the [497] thing. But we are of opinion that the phrase is aimed not at all possible false statements, but only at such as determine the identity of the article, possibly including its strength, quality and purity, dealt with in section 7. In support of our interpretation the first thing to be noticed is the second branch of the sentence: "Or the ingredients or substances contained therein." One may say with some confidence that in idiomatic English this half, at least, is confined to identity, and means a false statement as to what the ingredients are. Logically it might mean more, but idiomatically it does not. But if the false statement referred to is a misstatement of identity as applied to a part of its objects, idiom and logic unite in giving it the same limit when applied to the other branch, the article, whether simple or one that the ingredients compose. Again, it is to be noticed that the cases of misbranding, specifically mentioned and following the general words that we have construed, are all cases analogous to the statement of identity and not at all to inflated or false commendation of wares. The first is a false statement as to the country where the article is manufactured or produced; a matter quite unnecessary to specify if the preceding words had a universal scope, yet added as not being within them. The next case is that of imitation and taking the name of another article, of which the same may be said, and so of the next, a substitution of contents. The last is breach of an affirmative requirement to

disclose the proportion of alcohol and certain other noxious ingredients in the package—again a matter of plain past history concerning the nature and amount of the poisons employed, not an estimate or prophecy concerning their effect. In further confirmation, it should be noticed that although the indictment alleges a wilful fraud, the shipment is punished by the statute if the article is misbranded, and that the article may be misbranded without any conscious fraud at all. It was natural enough to throw this risk on [498] shippers with regard to the identity of their wares, but a very different and unlikely step to make them answerable for mistaken praise. It should be noticed still further that by section 4 the determination whether an article is misbranded is left to the Bureau of Chemistry of the Department of Agriculture, which is most natural if the question concerns ingredients and kind, but hardly so as to medical effects.

To avoid misunderstanding we should add that, for the purposes of this case, at least, we assume that a label might be of such a nature as to import a statement concerning identity, within the statute, although in form only a commendation of the supposed drug. It may be that a label in such form would exclude certain substances so plainly to all common understanding as to amount to an implied statement of what the contents of the package were not; and it may be that such a negation might fall within the prohibitions of the act. It may be, we express no opinion upon that matter, that if the present indictment had alleged that the contents of the bottles were water, the label so distinctly implied that they were other than water, as to be a false statement of fact concerning their nature and kind. But such a statement as to contents, undescribed and unknown, is shown to be false only in its commendatory and prophetic aspect, and as such is not within the act.

In view of what we have said by way of simple interpretation we think it unnecessary to go into considerations of wider scope. We shall say nothing as to the limits of constitutional power, and but a word as to what Congress was likely to attempt. It was much more likely to regulate commerce in food and drugs with reference to plain matter of fact, so that food and drugs should be what they professed to be, when the kind was stated, than to distort the uses of its constitutional power to establishing criteria in regions where opinions are far apart. See *School of [499] Magnetic Healing v. McAnnulty*, 187 U. S. 94. As we have said above, the reference of the question of misbranding to the Bureau of Chemistry for determination confirms what would have been our expectation and what is our understanding of the words immediately in point.

Judgment affirmed.

Mr. Justice HUGHES, with whom Mr. Justice HARLAN and Mr. Justice DAY concurred, dissenting: I am unable to concur in the judgment in this case, for the following reasons:

The defendant was charged with delivering for shipment in interstate commerce certain packages and bottles of drugs alleged to have been misbranded in violation of the Food and Drugs Act of June 30, 1906, chapter 3915, 34 Stat. 768.

The articles were labeled respectively "Cancerine tablets," "Antiseptic tablets," "Blood purifier," "Special No. 4," "Cancerine No. 17," and "Cancerine No. 1,"—the whole constituting what was termed

in substance "Dr. Johnson's Mild Combination Treatment for Cancer." There were several counts in the indictment with respect to the different articles. The labels contained the words "Guaranteed under the Pure Food and Drugs Act, June 30, 1906;" and some of the further statements were as follows:

Blood Purifier. This is an effective tonic and alterative. It enters the circulation at once, utterly destroying and removing impurities from the blood and entire system. Acts on the bowels, kidneys, and skin, eliminating poisons from the system, and when taken in connection with the Mild Combination Treatment gives splendid results in the treatment of cancer and other malignant diseases. I always advise that the Blood Purifier be continued some little time after the cancer has been killed and removed and the sore healed.

[500] Special No. 4. * * * It has a strong stimulative and absorptive power; will remove swelling, arrest development, restore circulation, and remove pain. Is indicated in all cases of malignancy where there is a tendency of the disease to spread, and where there is considerable hardness surrounding the sore. Applied thoroughly to a lump or to an enlarged gland will cause it to soften, become smaller, and be absorbed.

Cancerine No. 1. * * * Tendency is to convert the sore from an unhealthy to a healthy condition and promote healing. Also it destroys and removes dead and unhealthy tissue.

In each case the indictment alleged that the article was "wholly worthless," as the defendant well knew.

In quashing the indictment the district court construed the statute. The substance of the decision is found in the following words of the opinion:

Having regard to the intendment of the whole act, which is to protect the public health against adulterated, poisonous, and deleterious food, drugs, etc., the labeling or branding of the bottle or container, as to the quantity or composition of "the ingredients or substances contained therein which shall be false or misleading," by no possible construction can be extended to an inquiry as to whether or not the prescription be efficacious or worthless to effect the remedy claimed for it.

And the question on this writ of error is whether or not this construction is correct. *United States v. Keitel*, 211 U. S. 370.

What then is the true meaning of the statute?

Section 8 provides:

SEC. 8. That the term "misbranded," as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any [501] particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

The words "such article" in this section, as is shown by the immediate context, refer to "drugs" as well as to "food."

"Drugs" are thus defined in section 6:

SEC. 6. That the term "drug," as used in this act, shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals.

Articles, then, intended to be used for curative purposes, such as those described in the indictment, are within the statute, though they are not recognized in the United States Pharmacopœia or the National Formulary. And the offense of misbranding is committed if

the package or label of such an article bears any statement regarding it "which shall be false or misleading in any particular."

But it is said that these words refer only to false statements which fix the identity of the article. According to the construction placed upon the statute by the court below in quashing the indictment, if one puts upon the market, in interstate commerce, tablets of inert matter or a liquid wholly worthless for any curative purpose as he well knows, with the label "Cancer Cure" or "Remedy for Epilepsy," he is not guilty of an offense, for in the sense attributed by that construction to the words of the statute he has not made a statement regarding the article which is false or misleading in any particular.

I fail to find a sufficient warrant for this limitation, and on the contrary, it seems to me to be opposed to the intent of Congress and to deprive the act of a very salutary effect.

[502] It is strongly stated that the clause in section 8, "or the ingredients or substances contained therein," has reference to identity and that this controls the interpretation of the entire provision. This, in my judgment, is to ascribe an altogether undue weight to the wording of the clause and to overlook the context. The clause, it will be observed, is disjunctive. If Congress had intended to restrict the offense to misstatements as to identity, it could easily have said so. But it did not say so. To a draftsman with such a purpose the language used would not naturally occur. Indeed, as will presently be shown, Congress refused, with the question up, so to limit the statute.

Let us look at the context. In the very next sentence, the section provides (referring to drugs) that an article shall "also" be deemed to be misbranded if it be "an imitation of or offered for sale under the name of another article," or in case of substitution of contents or of failure to disclose the quantity or proportion of certain specified ingredients, if present, such as alcohol, morphine, opium, cocaine, etc.

It is a matter of common knowledge that the "substances" or "mixtures of substances" which are embraced in the act, although not recognized by the United States Pharmacopœia or National Formulary, are sold under trade names without any disclosure of constituents, save to the extent necessary to meet the specific requirements of the statute. Are the provisions of the section to which we have referred, introduced by the word "also," and the one relating to the place of manufacture, the only provisions as to descriptive statements which are intended to apply to these medicinal preparations? Was it supposed that with respect to this large class of compositions, nothing being said as to ingredients except as specifically required, there could be, within the meaning of the act, no false or misleading statement in [503] any particular? If false and misleading statements regarding such articles were put upon their labels, was it not the intent of Congress to reach them? And was it not for this very purpose that the general language of section 8 was used?

The legislative history of the section would seem to negative the contention that Congress intended to limit the provision to statements as to identity. The provision in question as to misbranding,

as it stood in the original bill in the Senate (then section 9) was as follows:

If the package containing it, or its label, shall bear any statement regarding the ingredients or the substances contained therein, which statement shall be false or misleading in any particular.

The question arose upon this language whether or not it should be taken as limited strictly to statements with respect to identity. It was insisted that the words had a broader range and the effort was made to procure an amendment which should be so specific as to afford no basis for the conclusion that anything but false statements as to identity or constituents was intended. An amendment was then adopted in the Senate making the provision read:

any statement as to the *constituent* ingredients, or the substances contained therein, which statement shall be false or misleading in any particular.

With this amendment the bill was passed by the Senate and went to the House. There the provision was changed by striking out the word "constituent" and inserting the word "regarding," so that it should read:

any statement regarding the ingredients or substances contained in such article, which statement shall be false or misleading in any particular.

Finally, it appears, that in conference the bill was amended by inserting the words "*design, or device,*" and also the words "*such article, or;*" and thus the section [504] became a part of the law in its present form—containing the words:

any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular.

It is difficult to suppose that, with the question distinctly raised, Congress would have rejected the provision of the Senate bill and broadened the language in the manner stated if it had been intended to confine the prohibition to false statements as to identity. Reading the act with the sole purpose of giving effect to the intent of Congress, I can not escape the conclusion that it was designed to cover false and misleading statements of fact on the packages or labels of articles intended for curative purposes, although the statements relate to curative properties.

It is, of course, true, that when Congress used the words "false or misleading statement" it referred to a well defined category in the law and must be taken to have intended statements of *fact* and not mere expressions of opinion.

The argument is that the curative properties of articles purveyed as medicinal preparations are matters of opinion, and the contrariety of views among medical practitioners, and the conflict between the schools of medicine, are impressively described. But, granting the wide domain of opinion, and allowing the broadest range to the conflict of medical views, there still remains a field in which statements as to curative properties are downright falsehoods and in no sense expressions of judgment. This field I believe this statute covers.

The construction which the district court has placed upon this statute is that it can not be extended to any case where the substance labeled as a cure, with a description of curative properties, is "wholly

worthless" and is known by the defendant to be such. That is the charge of the indictment.

[505] The question then is whether, if an article is shipped in interstate commerce, bearing on its label a representation that it is a cure for a given disease, when on a showing of the facts there would be a unanimous agreement that it was absolutely worthless and an out and out cheat, the act of Congress can be said to apply to it. To my mind the answer appears clear. One or two hypothetical illustrations have been given above. Others may readily be suggested. The records of actual prosecutions, to which I am about to refer, show the operation the statute has had and I know of no reason why this should be denied to it in the future.

Our attention has been called to the construction which was immediately placed upon the enactment by the officers charged with its enforcement in the Department of Justice and the Department of Agriculture. It is true that the statute is a recent one, and, of course, the question is one for judicial decision. But it is not amiss to note that the natural meaning of the words used in the statute, reflected in the refusal of Congress to adopt a narrower provision, was the meaning promptly attributed to it in the proceedings that were taken to enforce the law. And this appears to have been acquiesced in by the defendants in many prosecutions in which the defendants pleaded guilty. We have been referred to the records of the Department of Agriculture showing nearly thirty cases in which either goods had been seized and no defense made, or pleas of guilty had been entered. Among these are found such cases as the following:

No. 29. Hancock's Liquid Sulphur, falsely represented, among other things, to be "Nature's Greatest Germicide. * * * The Great Cure for * * * Diphtheria." Investigation begun November 22, 1907. Plea of guilty.

No. 180. Gowan's Pneumonia Cure, falsely represented, among other things, that it "Supplies an easily [506] absorbed food for the lungs that quickly effects a permanent cure." Investigation begun November 22, 1907. Criminal information. Plea of guilty.

No. 181. "Evelin," falsely represented, among other things, that it "Repairs and Rejuvenates the Eye and Sight." Investigation begun February 13, 1908. Plea of guilty.

No. 261. "Sure Thing Tonic," falsely represented, among other things, to be "Sure Thing Tonic. * * * Restores Nerve Energy. Renews Vital Force." Investigation begun June 3, 1909. Pleaded guilty.

No. 424. "Tuckahoe Lithia Water," falsely represented, among other things, to be "a sure solvent for calculi, either of the kidneys or liver, especially indicated in all diseases due to uric diathesis, such as gout, rheumatism, gravel stone, incipient diabetes, Bright's Disease, inflamed bladder, eczema, stomach, nervous, and malarial disorders." Investigation begun July 9, 1908. Plea of guilty.

No. 427. "Cancerine," falsely represented, among other things, to be "A remarkable curative extract which if faithfully adhered to will entirely eradicate cancerous poison from the system. * * * A specific cure for cancer in all its forms." Investigation begun about April 12, 1909. Criminal information. Plea of guilty.

I find nothing in the language of the statute which requires the conclusion that these persons who have confessed their guilt in making false and misleading statements on their labels should be privileged to conduct their interstate traffic in their so-called medicines, admittedly worthless, because Congress did not intend to reach them.

Nor does it seem to me that any serious question arises in this case as to the power of Congress. I take it to be conceded that misbranding may cover statements as to strength, quality and purity. But so long as the statement is not as to matter of opinion, but consists of a false [507] representation of fact—in labeling the article as a cure when it is nothing of the sort from any point of view, but wholly worthless—there would appear to be no basis for a constitutional distinction. It is none the less descriptive—and falsely descriptive—of the article. Why should not worthless stuff, purveyed under false labels as cures, be made contraband of interstate commerce—as well as lottery tickets? *Champion v. Ames*, 188 U. S. 331.

I entirely agree that in any case brought under the act for misbranding—by a false or misleading statement as to curative properties of an article—it would be the duty of the court to direct an acquittal when it appeared that the statement concerned a matter of opinion. Conviction would stand only where it had been shown that, apart from any question of opinion, the so-called remedy was absolutely worthless and hence the label demonstrably false; but in such case it seems to me to be fully authorized by the statute.

Accordingly, I reach the conclusion that the court below erred in the construction that it gave the statute, and hence in quashing the indictment, and that the judgment should be reversed.

I am authorized to say that Mr. Justice Harlan and Mr. Justice Day concur in this dissent.

UNITED STATES v. ONE CARLOAD OF CORNO HORSE AND MULE FEED.

(District Court, M. D. Alabama, N. D., May 31, 1911.)

188 Fed. 453; N. J. No. 990.

An article labeled "Corno Horse and Mule Feed. Mixture of ground alfalfa, oats, corn, flax bran, oat and hominy feeds, made by the Corno Mills Company, East St. Louis, Illinois"—followed by statement of a guaranteed analysis, *held* not adulterated or misbranded within the meaning of the Food and Drugs Act, on account of containing a quantity of oat hulls in excess of the amount normally present in whole ground oats.

Libel under section 10 of the Food and Drugs Act. Jury trial waived. Case tried to the court. Libel dismissed. The case was heard on the following agreed statement of facts and the testimony of a number of manufacturers, middle-men, millers, brokers and consumers as to the meaning of the term "oat feed" and how it was used and understood in commerce:

[454]¹ That the car load of Corno Horse and Mule Feed against which this libel is filed was contained in original bags or sacks of about 100 pounds and of about 175 pounds each, and that each of said original packages, being said sacks or bags, were branded: "Corno Horse and Mule Feed. Mixture of ground alfalfa, oats, corn, flax bran, oat and hominy feeds, made by the Corno Mills Company, East St. Louis, Illinois. Guaranteed analysis: protein 10%; [455] sugar and starch 58.5%; fat 3.5%; fiber 12%," said

¹ Numbers in brackets refer to pages of Federal Reporter.

brand being contained on each sack and label connected therewith. That the said Corno Horse and Mule Feed is an article of food within the meaning of the Food and Drugs Act; that on February 8, 1909, the above described bags or sacks of Corno Horse and Mule Feed were received in the city of Montgomery, in the State of Alabama, by Hudson and Thompson, claimants herein, a partnership composed of W. M. Hudson and J. A. Thompson, and that the car load of Corno Horse and Mule Feed, aforesaid, was shipped to said Hudson and Thompson on or about, to wit, February 4, 1909, from the city of East St. Louis, in the State of Illinois, by the Corno Mills Company of said city of East St. Louis, and that said car load or a large portion thereof of the Corno Horse and Mule Feed, aforesaid, at the time of the filing of this libel was in the original unbroken packages and in the possession of said Hudson and Thompson, in the city of Montgomery, State of Alabama, in the Northern Division of the Middle District of Alabama, and within the jurisdiction of this court. It is further admitted that there was present in the Corno Horse and Mule Feed, aforesaid, seized under the libel herein, a quantity of oat hulls in excess of the amount that would have been naturally and normally present in case whole ground oats had been used in lieu of the same amount of oat feed—using the term oat feed here according to the construction contended for by the claimants herein; namely, as a by-product of the oatmeal or rolled-oat factory, said by-product consisting of the entire residue of the oats after the manufacture of the oats into food for human consumption, and consisting of the middlings, nubbins, oat dust, and hulls. By this admission is meant that there was used in the Corno Horse and Mule Feed aforesaid, a quantity of the by-product of the rolled-oat mill consisting of the oat hulls, middlings, nubbins and dust as above described.

The defense also admitted that "oat feed" contains less of protein and more of hulls than an equal amount of whole ground oats.

JONES, *District Judge* (after stating above facts). The term food, as used in the Food and Drugs Act, included all articles used for food by men or other animals, whether simple, mixed or compound. An "article of food" is deemed to be adulterated, "if any substance has been mixed or packed with it so as to reduce or lower or injuriously affect its quality or strength," or, "if any substance has been substituted, wholly or in part, for the article," or, "if any valuable constituent of the article has been, wholly or in part, abstracted," or, "if it contains any added poisonous or other added deleterious ingredient which may render such article injurious to health," or, "if it be mixed, colored, powdered, coated or stained whereby damage or inferiority is concealed," or, "if it consists, wholly or in part, of a filthy, decomposed or putrid animal or vegetable substance," etc.

An article of food is "misbranded" within the meaning of the statute if it be "an imitation of, or offered for sale under the distinctive name of another article," or, "if it be labeled or branded so as to deceive or mislead the purchaser," or, "if in package form and the contents are stated in terms of weight and measure they are not plainly and correctly stated on the outside of the package," or, "if the [456] package or label containing it shall bear any statement,

design or device regarding the substances or ingredients contained therein, which statement, design or device shall be false or misleading in any particular."

Section 8 contains a proviso—

that an article of food which does not contain any added poisonous or deleterious ingredient, shall not be deemed to be adulterated or misbranded in the following cases:

First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food under their own distinctive name, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

Second. In the case of articles labeled, branded or tagged so as to plainly indicate that they are compounds, imitations or blends, and the words "compound," "imitation" or "blend," as the case may be, is plainly stated on the package and the package in which it is offered for sale.

The manufacturer, without violating any of the provisions of the statute against adulteration, may mix any number of constituents in his compound, so long as these constituents are not poisonous or deleterious to health and he gives the compound a distinctive name and states where it is manufactured. The matter thus produced is "the article of food" whose quality and strength the statute seeks to preserve, and the nature of the product in these respects is fixed and determined by the elements which enter into it. How is it possible, chemically, or in the eye of the law, to "lower or injuriously affect" the quality or strength of the particular "article of food," whose characteristics are thus produced, and safeguarded by the law as thus produced, under its own distinctive name, by mixing in the compound anything which may be lawfully incorporated therein? Putting in a mixture of things which may be lawfully blended therein cannot amount to adulteration of the blend, since, other things aside, the statute declares, its other conditions being complied with, the blend shall not thereby "be deemed to be adulterated."

Corno Horse and Mule Feed is a compound, sold under its own distinctive name. One of the constituent elements which fix and determine the quality and strength of that blend is "oat feed." The incorporation of "oat feed" in the blend, unless it be noxious or deleterious to health, cannot adulterate the blend which has its own standard, quality, and strength, made up in part of "oat feed." To make a case of adulteration it must be shown that "oat feed" contains noxious qualities, as described in the statute. Otherwise, it is manifest that the incorporation of "oat feed" in the blend has not mixed or packed any substance with the blend—"Corno Horse and Mule Feed"—so as to reduce or lower or injuriously affect *its* quality or strength," or that "any valuable constituent of the article of food has, wholly or in part, been subtracted from the blend, or that any substance has been substituted, wholly or in part," for the "article of food." Corno Horse and Mule Feed is not an imitation of, or offered for sale under the distinctive name of, another article, but is sold under its own distinctive name, and the label or brand contains a statement which shows that it is a mixture, and truthfully states its constituents and the place where the article was manufactured or produced. There [457] is no charge or proof of removal of any part of the contents of the package as originally put up. It is not claimed

or proved that the matter of which the "oat feed" consists is deleterious, in any way to man or other animal, or charged that the provisions of the statute against adulteration have been violated in any way, save by putting "oat feed" on the label. The libel must fail as to the charges of adulteration.

The label here does not contain any design or device of any kind, and whether there has been a misbranding within the meaning of the statute must depend on the words employed in the label to describe the Corno Horse and Mule Feed. Save by the declaration in the statute as to what a label shall not contain, no standards are prescribed for brands or labels, or the minuteness or particularity in which they must indulge in describing an article of food. The statute should be liberally construed to affect its beneficent purposes; but no rule of construction permits us to so construe its language, that the statute shall operate as a snare or trap to the honest manufacturer or producer, who brands or labels his products in descriptive words or devices, which fairly inform the purchaser of the nature and ingredients of the product offered for sale, and are not so framed as to deceive or mislead the ordinary purchaser.

The parties have deemed it important to introduce a vast mass of testimony as to the meaning of the term "oat feed." As the court is sitting both as trier of the law and the facts, it is deemed unnecessary to determine whether the meaning of the term "oat feed," as here used, is a matter of pure law, or whether it is a question of fact, to be ascertained as by a jury from the whole evidence. If it be a matter of law of which the court must take judicial notice, the court may nevertheless resort to any authoritative sources of information to enlighten its judgment, and, on the other hand, if it be a question of fact, the judge sitting as a jury may well determine the meaning of the words here as a question of fact, according to the weight of the evidence.

The Government claims that "oat feed" means the whole grain of the oat, either crushed or ground, and the ordinary purchaser of the blend so understands the term "oat feed" used in the label, though it admits the manufacturer gives a different meaning to it. The manufacturer claims, on the contrary, that "oat feed" means the by-product of the rolled oat or oat meal mills—that part of the grain which remains after the miller subtracts from it the portions useful for human food, consisting of nubbins, middlings, hulls and oat dust, the entire residue of the grain after the oat is prepared by the manufacturer for human consumption—and that the term has long been so understood in commerce and trade and by the public at large.

The whole trend of the evidence is, that in nearly all by-products the word "feed" when connected with a grain, is used to denote the by-product from that grain, meaning the residue of the grain after it is manufactured into food for human consumption, and that, when it is intended to designate the whole grain or the crushed grain entering into articles of food for man, the thing is spoken of as "food" and not "feed."

[458] The Government admits that the words "hominy feed" mean the by-product from the hominy mills and are so used, known, and understood. It admits that other terms are used in the same way to denote other products. The evidence leaves no doubt that

the terms "barley feed," "rye feed," "wheat feed," "buckwheat feed," "mixed feed," and other similar terms, are used to designate those by-products, and are popularly known and understood as such. It shows that "oat feed" is different from whole ground oats or crushed oats, and that the difference is clearly apparent to the naked eye, and that at all times the price of "oat feed" is considerably lower than that of the ground oats. It further shows that "oat feed" seldom reaches the consumer as a separate commodity, but is most generally offered for sale as an ingredient of a mixed feed, or, as it is denominated in many of the State laws, "concentrated feed stuff." It also shows that the term "ground oats" is universally used to designate that product, and that likewise "crushed oats" is used to designate the oats when they are crushed, and that "chopped oats" or "oat chops" is used to designate the chopped oats, and there is no evidence to show that any of the products have ever been designated or understood to mean the same thing as "oat feed." Many of the States have recognized "oat feed" as a by-product of the oat, in their food laws, notably New York, Maine, Louisiana, Iowa, Wisconsin, Virginia, New Hampshire, New Jersey, Texas, Florida, Connecticut, Illinois, Michigan, Massachusetts, Maryland, and Tennessee. Bulletins from various State agricultural experiment stations were offered in evidence, showing that "oat feed" is recognized as a by-product in New Jersey, Georgia, Ohio, Tennessee, and Virginia.

Among other evidence introduced by the defense was a letter of January 27, 1910, from the Board of Food and Drug Inspection, concurred in by all its members, and addressed to counsel in this case. It is given in full because it shows the Government was by no means certain as to the correctness of its contention as to the meaning of "oat feed." It indicates that its inquiries tended to show that "oat feed" in fact means the by-product of the oat mill, but that its opinion was that it should not be known as "oat feed," which the board thought should include ground oats only. In this particular, it is beside the issue, for the question is what "oat feed" describes in our language, and not what it ought to describe. Neither the Secretary of Agriculture nor any official intrusted with the administration of the Food and Drugs Act has any authority to change the meaning of words. The letter, omitting address and signature, is as follows:

Your letter of January 15, 1910, in references to the cases reported to the Department of Justice against the Corno Mills Company of East St. Louis, Ill., for prosecution under the Food and Drugs Act, has received careful consideration. Your statement is noted that you are of the opinion that unless the Department of Agriculture has changed its view as to the meaning of the term "Oat Feed" the proceedings against the shipment of Corno Horse and Mule Feed seized at Valdosta, Georgia, should not be dismissed, in view of the promise of this department of an early judicial construction of the meaning of the term and the completion of your arrangements for the taking of all necessary evidence.

[459] You are advised in reply that the records of the board do not show that a promise has been made by the board that the meaning of the term "Oat Feed" shall be construed by the courts at an early date. As you are aware, such promise, even if made by the board, would be ineffective. The duties of the Board of Food and Drug Inspection end with the collection of evidence and the preparation of reports of violations of the Food and Drugs Act. When the evidence is complete and the circumstances of the violations appear to the Secretary of Agriculture to warrant such action, the cases are reported to the Department of Justice for prosecution, and the time when a particular case

may come on for trial rests with the Department of Justice. After cases are so reported, whenever additional evidence bearing on the questions involved comes to the knowledge of the board, such evidence is also brought to the attention of the Secretary of Agriculture for consideration whether the same should be transmitted to the Department of Justice.

When the question was presented to the board whether proceedings should be instituted against the shipment seized at Valdosta, Georgia, such action was recommended on the statement of the Bureau of Chemistry that the term "Oat Feed" properly includes only ground whole oats, and the amount of oat hulls found on examination of samples to be present in the product was considerably in excess of the amount which normally would be present in a product containing ground whole oats. Analysts of the Bureau of Chemistry were of the opinion that the term "Oat Feed" as applied to oat-offal or by-products of the oat meal, is misleading, and the Bureau of Chemistry has in its possession affidavits of dealers in cattle feed and grain who express the opinion that the product sold in the trade as "Oat Feed," which consists largely of oat hulls, should not be known as "Oat Feed," and that the term "Oat Feed" should include ground oats only.

Inasmuch as the foregoing views of the Bureau of Chemistry were earnestly controverted by the Corno Mills Company and other manufacturers of cattle feeds and many dealers in cereal products, letters of inquiry were addressed by the Solicitor of this department to representative manufacturers and dealers, and replies were received indicating that "Oat Feed" is generally understood among the trade to be the by-product of the oat meal mill and consisting of oat hulls, oat nubbins, oat dust and middlings. It further appears from these replies that screenings from oat elevators are also known and sold as "Oat Feed" and that ground whole oats are never sold as "Oat Feed" but as ground oats.

In view of the difference of opinion as to the significance of the term "Oat Feed," as set forth above, the crop technologist in charge of grain standardization in the Bureau of Plant Industry in this department, who has a thorough knowledge of the grain industry in this country, was consulted. The crop technologist stated, so far as he is informed, the term "Oat Feed" in the grain trade means the by-products of the oat mill, including oat hulls, oat nubbins, oat dust, middlings, and screenings from oat elevators; he further stated that ground whole oats are not designated as "Oat Feed" because ground whole oats are a superior product and command a higher price in the market than oat feed.

When, therefore, the United States attorney in charge of the proceedings against the seizure at Valdosta requested the opinion of the Department of Agriculture concerning the disposal of the case, in view of the stipulation which had been entered into with the defendants for the taking of testimony, he was informed by the Solicitor of all the facts hereinbefore related in reference to the meaning of the term "Oat Feed" and was advised that the Department of Agriculture was satisfied to leave to his discretion the question whether the case should be prosecuted or dismissed. After consideration of the matter, the United States attorney decided to dismiss the case.

When the department was advised of this action of the United States attorney, it was deemed advisable to inform the United States attorneys at Montgomery, Alabama, and Danville, Illinois, to whom cases involving the same question had been referred for prosecution, of all the facts within the knowledge of the Department of Agriculture concerning the [460] meaning of the term "Oat Feed." They have been informed accordingly, and have been requested to advise the Solicitor of this department whether, after consideration thereof, they are of the opinion that the cases pending in their respective districts based on shipments of Corno Horse and Mule Feed, should be prosecuted or dismissed. The department is not yet in receipt of the opinions of the United States attorneys. Pending the decision of the United States attorney at Montgomery, Alabama, and the United States attorney at Danville, Illinois, whether cases can be maintained under the Food and Drugs Act which are based on the significance applied to the term "Oat Feed" by the Bureau of Chemistry, the Board of Food and Drug Inspection has not determined whether cases shall be reported for prosecution in the future in which the same issue is presented. When the replies of the United States attorneys are received, however, the board will consider and determine what attitude shall be taken in this particular, and when a decision has been reached you will be informed accordingly.

The testimony introduced on behalf of the defense was from manufacturers, middle-men, wholesalers, retailers and consumers, and covered not only the United States, but two foreign countries as well, and showed that in them for a great many years the term "oat feed" has been used and understood not only by the manufacturer and all classes of middle-men, but also by the ultimate consumer, to mean the by-product of the rolled-oat or oatmeal mills, in the same way that other by-products have been known by similar names. No witnesses, except Mr. Brown, testified that he ever heard the term "oat feed" applied to whole, ground or crushed oats. Dr. Voorhees, of the New Jersey Experiment Station, and Mr. Fuller, of the Indiana Experiment Station, showed very clearly from their examinations and experience, the term "oat feed" in commercial usage and wherever used in trade and commerce, is known and understood to be the by-product of the oat mill.

The defense also introduced Bulletin No. 108, issued by the Department of Agriculture, April 2, 1908, regarding the "Commercial Feeding Stuffs of the United States." This is a very valuable paper prepared by Dr. J. K. Haywood, Chief of the Miscellaneous Laboratory, and one of the principal witnesses for the Government in this case, Mr. Warner, the Chief Chemist, and Mr. Howard, chief of the Microchemical Laboratory. The paper is the result of chemical examinations of the various stock foods, their methods of manufacture and analyses of commercial feeding stuffs conducted at a number of the State experiment stations. Table 17 of "Oat Feed" deals with the contents of seven different samples of "oat feed." The bulletin says, on page 12: "The main source of oat feed is the breakfast food factories. In many cases they are composed almost entirely of the oat hulls and light oats left as waste from oat meal manufacture." It distinguishes between oatmeal and ground whole oats. In Farmers' Bulletin No. 170, issued by the Department of Agriculture, it is shown that "oat feed" is recognized by the department as a by-product of oats.

The Government offered testimony of a considerable number of witnesses, consumers and dealers in feeding stuffs, near Washington, St. Louis, Knoxville, Kansas City, and Montgomery. Almost [461] without exception, the result of the testimony of these witnesses when analyzed amounted to no more than their expression of opinion as to what the term "oat feed" should mean, not disclosing any knowledge of its actual meaning as understood by customers familiar with the product. Dr. Haywood, chemist of the Board of Food and Drug Inspection, Mr. Lynch, inspector, and Hon. L. F. Brown, of New York, gave the strongest testimony for the Government as to what "oat feed" meant. Upon cross-examination, Dr. Haywood testified, that without first telling the person that "oat feed" was a part of the label describing a compound commodity, or asking whether he was acquainted with the commodity, he would ask him what he would expect to get if he were buying *oat feed*? That practically nobody whom he interviewed had ever heard of that particular commodity, which counsel for the defense called "oat feed," and, when questioned by Dr. Haywood about the term "oat feed," the persons questioned, would immediately answer, "Yes, ground oats." Dr. Haywood further testified on cross-examination, that at the time

of his inquiries, a year or two before this proceeding was instituted, he had never heard the term "oat feed" used to designate ground oats, and that in his opinion, the term "oat feed" meant ground oats, and that such was the result of his investigations. He further testified, on cross-examination, that he had never heard of the term "oat feed" being used to designate ground whole oats; but that "ground oats" is a term well understood throughout the length and breadth of the country; that ground oats means the oats ground up, without anything added or subtracted, the whole grain with nothing taken away or added; that he had never heard of anybody offering ground oats, crushed oats or chopped oats or oat chops under the name "oat feed."

Mr. Brown, the chief of the New York State Department of Agriculture, testified that the meaning of the term "oat feed" with the New York State Department of Agriculture was ground oats, either crushed, whole or ground oats, from which nothing had been taken away or added, and that the term was so understood throughout the State. His practical experience, however, was limited to Cobleskill, a town of about 2,500 inhabitants, some fifteen years ago. His testimony on this point is directly opposite to that of the numerous witnesses called by the defense as to the understanding of the term "oat feed" in New York State, and its weight is destroyed by the fact that the laws of the State of New York, relative to feed stuffs, recognize the distinction between oats and oat feed, classing the latter among the by-products. It is not unlikely that Mr. Brown's experience at Cobleskill was a confusion of the expression "feed of oats" with the commodity term "oat feed."

Mr. Lynch, the inspector, conducted his investigations along the same lines as Dr. Haywood. He would show the person of whom he inquired, a copy of the label and ask what meaning it conveyed; and if the answer should be ground oats, crushed oats or whole oats, he would ask the person if he found out, in purchasing feed thus labeled, that he had gotten the oat refuse or by-product of an oat meal mill, would he consider that he had been deceived? That he did not first [462] ascertain from the person, of whom he inquired, whether he had any knowledge of the commodity "oat feed." In most instances the person, of whom the inquiry was made, had little, if any, knowledge of by-products or any feeding stuffs except hay and in some instances wheat by-products, and they were the ones who were asked to give their opinions as to the meaning of the term "oat feed" in the Corno Horse and Mule Feed label. Lynch states that he interviewed about two hundred people in the different Southern States, and, almost without exception, they would expect to get ground or crushed oats, from looking at the term "oat feed" on the label.

The issue, however, is not what such persons with such lack of familiarity with the product would understand "oat feed" meant, but what idea the term ought to convey to persons of ordinary intelligence, who are conversant with our language. The power of Congress to pass the statute is derived solely from its authority to regulate commerce, and it must have uniform operation throughout the United States. It deals with articles of food which enter into interstate commerce. It would be unthinkable that Congress intended

that a product could be seized in one district and not in another for a misleading brand, according or not as the generality of persons in those districts understood or were deceived by the brand on the particular product.

Language is "the expression of thought by means of spoken or written words," and words are but signs of ideas. If a person does not know English, he cannot understand the idea or conception or sign meant to be conveyed by a word. So as to a commodity term; people unfamiliar with the term or its meaning, seeing on a label the word which stands for a commodity term, would not know what it meant, and numbers of them would state, quite honestly, that, seeing the word, "oat feed" on the label, they were deceived as to what it meant and thought "oat feed" meant to describe the grain of the oat, rolled, crushed or chopped.

All words in the beginning were arbitrary signs. They became part of the language only by common usage among the people after they had generally been accepted or taken to express or stand for a particular thought or idea. When a word obtains such currency or general acceptance, the people use it to convey that particular idea to the persons to whom it is addressed, and the word continues to have that meaning and function in the language until common usage among the people accords another and different meaning to it. Language grows and changes with the growth and changes in social and economic conditions, and expressions creep into the language by a gradual process of evolution wrought by the necessity for more precise expressions and greater convenience in depicting old ideas or new conditions and things. Words are thus being constantly coined and put in circulation, and, their meaning being generally understood among the people, they become accepted parts of our speech, sometimes for years, before they are formally acknowledged and incorporated in standard dictionaries. A century ago no one would have understood what idea was meant to be conveyed by the words "chloroform," "telephone," [463] "telegraph," "aeroplane," "automobile," "X-rays," and the like. Now they are common nouns, parts of common speech, and understood by all who speak our language.

The evidence satisfied the court, if that be the only means by which it can ascertain the fact, that when our people speak of the products of a particular grain or vegetable and use the word by which that grain or vegetable is commonly called, and add the suffix "feed" they mean to convey the idea that the substance described is the by-product of that grain or vegetable—the residue after subtracting from the grain or vegetable those parts which are useful for human food. The evidence shows that this meaning has so long been understood in the dealings between persons who buy and sell feed stuffs, and from the designation given the product, in laws, trade journals, market reports, in the newspapers, and in official publications in reference to food for man or other animals, that the term "oat feed," and other like terms, have become common nouns in our vernacular, and describe by-products, and therefore, ought not to lead anyone, who understands English and reads the label, to reach the conclusion that the term "oat feed" means the whole, ground, or crushed grain; especially when the term "oat feed" is used in juxtaposition with the word "oats" on the label, and inevitably implies that the "oat feed"

contained in the mixture is something different from the "oats" therein.

The term "oat feed" on the label is not false, but truthfully designates that portion of the constituents of the blend which consists of the "oat feed" and is correctly described by those words. The purchaser buys the product for cattle food and knows it is put upon the market for that purpose. On the label here, after giving all the elements which enter into the blend, follows a plain statement of the qualities and nutritive values of the combined product for cattle food. After naming the elements put in the blend, the purchaser is told of the proportions of protein, sugar, starch, fat, and fiber, thus giving him additional means of ascertaining and judging of the nutritive properties and values of the product for cattle food. All who interest themselves in food supplies know, for instance, that protein serves to build up new tissues, replace broken down cells, and may also serve as a source of heat and energy, and so of the properties of sugar and starch, fat, and fiber, and their relative nutritive values. It might as well be said that the stated analysis of the product in these respects was misleading, because the manufacturer did not particularly define, in the statement in reference thereto, the offices which the different elements performed in lowering or increasing the nutritive properties of a particular product—as to the charge that the use of the word "oat feed" was misleading, because it did not go further and descend to minuteness of particulars and description of the thing of which "oat feed" consists and state on this label, descriptive of stock food, that it consisted of the residue of the grain after the most valuable parts of the oat had been subtracted by the manufacturer for human food.

The great object of the statute is to prevent injury to health and deception by putting words or devices on the label which may [464] naturally lead the purchaser to believe that he is getting one thing when in reality he is getting another. Certainly the manufacturer meets all these requirements when he truthfully describes the elements of his product by the use of common nouns which fairly describe the things which enter into it, according to the English vocabulary and adds, as he is not required to do by the Federal statutes, an analysis of the life-giving properties of the different elements, thus affording additional means of judging of the real value of the blend for cattle food, the use for which it is manufactured and put upon the market.

Of course, if "oat feed" meant the whole grain of the oat, either crushed, ground, or rolled, and oat hulls were packed in the blend "in excess of the amount normally present" in whole, ground or crushed oats, the label would be misleading; but, there is no ground for such charge when it is ascertained that "oat feed" does not mean the whole grain of the oat in some form, but only the by-product of the oat—"oat feed." The admission as to the quantity of oat hulls "naturally and normally present" in "oat feed" relates only to the whole grain of the oats, and not to the "oat feed," which is a mere by-product, which the term on the label correctly described. If there were a greater quantity of oat hulls in the by-product, sold under this label as "oat feed," than in such feed as generally sold, the brand "oat feed" might be misleading in that respect; but no such contention

was made, and, if it had been, the proof would not sustain it. The admission of the parties as to the quantity of "oat hulls" "naturally and normally present" in "oat feed" is an admission to that extent, only in case the whole ground oats had been used in lieu of the same amount of "oat feed."

Under the statute compounds known as articles of food can be sold under their own distinctive names, so long as no deleterious matter is put in the product, and the label states where the product is manufactured, and it is not an imitation sold under the distinctive name of another article. The manufacturer here would have fully obeyed the statute if he had put nothing on his product but the name "Corno Horse and Mule Feed," complying with its requirements in other respects. Such a brand would not give purchasers the hundredth part of the information of the elements and value of the product which is imparted by the more elaborate brand which was put upon the product.

It would be a very harsh construction of the statute to hold that it required the forfeiture of the product on the ground that the label was misleading, because some person, unfamiliar with the commodity and the common use of language in designating it, might believe he was buying the whole oat when he was getting only the by-product, in consequence of the label, which truthfully described the product as "oat feed," not descending into greater minuteness of description and telling the particulars wherein "oat feed" differs from oats.

Let the libel be dismissed.

UNITED STATES v. 300 CANS OF FROZEN EGGS.

(Circuit Court of Appeals, Second Circuit, June 6, 1911.)

189 Fed. 351; Circular No. 55, Office of the Solicitor.

A libel for the condemnation of adulterated food, filed under section 10 of the Food and Drugs Act, held not fatally defective for failure to allege that the article had been shipped in interstate commerce for sale.

Appeal from the District Court of the United States for the Southern District of New York.

Libel by the United States against 300 cans of frozen eggs claimed by the European Egg Company. From a judgment sustaining exceptions to the libel, the Government appeals. Reversed.

[352]¹ Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, *Circuit Judge*. This is a libel filed by the United States for the condemnation of 300 cans of frozen eggs under sec. 10 of the Food and Drugs Act of June 30, 1906, c. 3915, 34 Stat. 771 (U. S. Comp. St. Supp. 1909, p. 1193). The material allegations are as follows:

(1) This libel is filed by the United States of America in its own right, and prays seizure for condemnation of certain articles of food as hereinafter particularly set forth in accordance with the Food and Drugs Act of Congress, approved June 30, 1906, 34 Stat. 768.

¹ Numbers in brackets refer to pages of Federal Reporter.

(2) Your libelant represents to the court, that in the city, county and Southern District of New York, and within the jurisdiction of this honorable court, there are owned by the European Egg Company and stored at the Harrison Street Cold Storage Warehouse, number 7 Harrison Street, Borough of Manhattan, City of New York, 300 cans, each containing an article of food, to wit, frozen eggs, each weighing approximately 28 pounds.

(3) Your libelant further represents that said articles of food so as aforesaid particularly described are illegally held within the jurisdiction of this honorable court, and are liable to condemnation and confiscation, as provided in the said act of Congress:

In that each of the said 300 cans contains an article of food, to wit, frozen eggs, which being animal substance, is in whole or in part filthy, putrid, and decomposed, contrary to the provisions of subdivision 6 of section 7 of the act of June 30, 1906.

Your libelant further represents that the said articles were shipped from South Omaha, Nebraska, by the European Egg Company, on or about the 3d [353] day of October, 1910, via the Chicago, Burlington and Quincy Railroad Company, the Chicago, Indiana and Southern Railroad Company, and the Erie Despatch, and were thereafter transported and delivered to said European Egg Company at the Harrison Street Cold Storage Warehouse, number 7 Harrison Street, at the Borough of Manhattan, in the City of New York, on or about the 8th day of October, 1910, and that the said articles remain unsold in their original unbroken packages in the said city, county and State of New York and in the Southern District of New York.

The European Egg Company, claimant, filed exceptions to the libel as follows:

First Exception. That this honorable court has no jurisdiction of the matters contained in said libel, the same not being matters that come under the Food and Drugs Act of Congress, approved June 30, 1906.

Second Exception. For that the said libelant has not well and sufficiently set forth evidence to warrant the issuance of said libel, in so far as it does not state that said frozen eggs were seized while being used in interstate commerce.

The district judge sustained the exceptions to the libel, saying:

I think that *Hipolite Egg Co. v. United States*, 220 U. S. 45, 31 Sup. Ct. 364, 55 L. Ed. 364, covers this case if the eggs had been alleged to have been shipped "for sale." The statute, sec. 10, says "transported * * * for sale," and the libel does not follow the statute, though it does say that they remain unsold. That is hardly enough. It is not necessary to consider the power of Congress if the transportation was not for sale, but for aught that appears these eggs were not to be sold either as eggs or in any form. Therefore the libelant must amend. Exceptions sustained.

The United States having failed to amend the libel, it was dismissed and this appeal taken from the decree.

We think the learned judge erred in treating the charge in the libel as against the cases while being transported. The second exception seems to proceed on this ground. The act expressly describes the guilty goods in such a case as "being transported * * * for sale." But the charge was against the goods in the original packages after transportation was over. The applicable words of the act are "or having been transported remains unloaded, unsold or in original unbroken packages." The allegations as to the carriage of the goods between Nebraska and New York were made for the purpose of showing that they were a subject of interstate commerce.

It would be a very natural construction to hold that the words "for sale" describing the goods seized in course of transportation are to be carried forward to the goods in the next category seized after transportation is over as the claimant contends under the first exception. Indeed, this was the construction adopted by Sater, J., in *United States v. 46 Bags of Sugar* (D. C.) 183 Fed. 642. But the

decision of the Supreme Court in *Hipolite Egg Co., Claimant of 500 Cases of Preserved Eggs v. United States*, decided March 13, 1911, makes this construction impossible. The opinion of Mr. Justice McKenna and the transcript of record in that case shows that Thomas & Clarke (for whom the Hipolite Egg Company was substituted as claimant) were the owners of 370 cases of "preserved whole eggs" in a cold-storage warehouse at St. Louis, Mo., which they had previously bought from the Hipolite Egg Company of that city: that Thomas & Clarke shipped [354] 50 cases of these eggs from St. Louis to themselves at Peoria, Ill., to be used in their business as manufacturing bakers which were the cans seized in the original packages on their premises after the transportation was over. The charge in the libel was:

That the said fifty cans, more or less, containing said food product and so adulterated as above set forth, have been transported from the City of St. Louis, in the State of Missouri, to the City of Peoria, in the State of Illinois, in the division and district aforesaid, and remain unsold in this district in the original and unbroken package, in the possession of Thomas and Clarke, in the City of Peoria, in violation of the said act approved June 30, 1906.

Although the district judge found that the eggs were not transported for sale, but for use by the consignees in their business, he entered a decree of condemnation which the Supreme Court affirmed. The case is precisely similar to the one under consideration. Mr. Justice McKenna states the claimant's contention as follows:

(1) Sec. 10 of the Food and Drugs Act does not apply to an article of food which has not been shipped for sale but which has been shipped solely for use as raw material in the manufacture of some other product.

He then goes on to say after considering Judge Sater's opinion, *supra*:

The object of the law is to keep adulterated articles out of the channels of interstate commerce, or, if they enter such commerce, to condemn them while being transported or when they have reached their destination, provided they remain unloaded, unsold or in original unbroken packages. These situations are clearly separate, and we cannot unite or qualify them by the purpose of the owner to be a sale. It, indeed, may be asked in what manner a sale? The question suggests that we might accept the condition, and yet the instances of this record be within the statute. All articles, compound or single, not intended for consumption by the producer, are designed for sale, and, because they are, it is the concern of the law to have them pure.

It is, however, insisted that "the proceedings in personam authorized by the law was intended to, and no doubt is, capable of giving full force and effect to the law"; and, further, that a producer in a State is not interested in an article shipped from another State which is not intended to be sold or offered for consumption until it is manufactured into something else. The argument is peculiar. It is certainly to the interest of a producer or consumer that the article which he receives, no matter whence it come, shall be pure, and the law seeks to secure that interest, not only through personal penalties but through the condemnation of the article if impure. There is nothing inconsistent in the remedies, nor are they dependent. *The Three Friends*, 166 U. S. 1, 49, 17 Sup. Ct. 495, 41 L. Ed. 897. The first contention of the egg company is, therefore, untenable.

The district judge dismissed the libel because it did not describe the goods as transported "for sale," whereas this exception should have been overruled. Willard, J., has come to conclusions similar to ours in *United States v. Two Barrels of Desiccated Eggs* (D. C.), 185 Fed. 302, 307.

It was further suggested at the hearing that these eggs might have been intended for other uses than food uses and that the libel should have alleged that they were to be used for food purposes. It does describe the goods as articles of food and this is quite sufficient to withstand these general exceptions.

[355] Finally, it is said that as the egg company shipped to itself, without sale, the packages were never a part of interstate commerce. We know of no authority for such a proposition. Certainly the case of Hipolite Egg Company is not such. The decree is reversed.

UNITED STATES v. THE RICHIE COMPANY.

(Circuit Court, E. D. New York, July 5, 1911.)

N. J. No. 2554.

A medicine intended for use as a cure for drug habit *held* misbranded in that the quantity or proportion of morphine present was not correctly declared.

Information charging misbranding in violation of the Food and Drugs Act. On demurrer to information. Demurrer overruled. Plea of guilty. Sentence suspended.

VEEDER, *District Judge* (overruling demurrer). The defendants demur to an information charging them with a violation of section 2 of the Food and Drugs Act of June 30, 1906. The drug product alleged to be misbranded bears the following statement on the label: "This bottle of remedy is 12½ per cent alcoholic solution, compounded from the following ingredients: Pepsin, morphina, atropia and salicylic acid. Ingredients and amounts used vary with the needs of each patient, but the proportion of any ingredient is less than 4 per cent."

Section 8, subdivision second, of the act specifies that a drug shall be deemed to be misbranded if it fail to bear a statement on the label of the quantity or proportion of morphine contained therein. It is plain that this label does not state the quantity or proportion of morphine contained in the preparation. But the defendants claim that it complies with regulation 28, subdivision (d), which reads: "A statement of the maximum quantity or proportion of any such substance present will meet the requirements, provided the maximum stated does not vary materially from the average quantity or proportion."

A short answer to this contention is that even if the statement on the label that "the proportion of any ingredient is less than 4 per cent" be taken as a statement of the maximum quantity or proportion of morphine contained in the preparation, still, as the label states, the amount varies, and it may appear from the evidence that the maximum stated varies materially from the average quantity or proportion.

The demurrer is overruled, with leave to plea over.

UNITED STATES v. 100 BARRELS OF VINEGAR.

(District Court, D. Minnesota, F. D., July 14, 1911.)

188 Fed. 471; N. J. No. 1159.

Vinegar sold as pure cider vinegar, which showed only 0.11 per cent to 0.16 per cent glycerin, *held* adulterated and misbranded because it was not pure cider vinegar.

Libel under section 10 of the Food and Drugs Act. On motion of Spielman Bros. Co., claimant, to dismiss the libel. Motion denied. Case tried to court without jury. Decree of condemnation and forfeiture.

MOTION TO DISMISS THE LIBEL, AND COURT'S RULING THEREON.¹

Now at the close of all the evidence and after both the libelant and claimant have rested in the above entitled cause comes Spielman Bros. Co., claimant, by its attorneys, and moves the court to dismiss the libel herein because said libel fails to allege and the evidence fails to show that prior to the institution of these proceedings the Secretary of Agriculture caused notice of the alleged misbranding and adulteration of the vinegar seized herein to be given to said claimant or to Barrett & Barrett or to any other person from whom samples were obtained; or that said claimant or said Barrett & Barrett or any other person was given an opportunity to be heard under the rules and regulations prescribed by the three Secretaries mentioned in section 3 of the Food and Drugs Act of June 30, 1906, under which this proceeding is had, on the question of whether or not the said vinegar was adulterated or misbranded within the meaning of said act all as provided in section 4 of said act.

The COURT (WILLARD, *District Judge*). While I have no case before me in which this matter has been decided, yet I have read the decisions which have been announced, and have considered the matter more or less. After such consideration I have come to the conclusion that in a proceeding under section 10 of the act of June 30, 1906, 34 Stat. 768, a preliminary investigation is not necessary. The construction of the word "penalties" in section 5, is quite enlightening in determining this question. As has been said, section 2 provides for a penalty against the person, and only provides for fines that are improperly called penalties. This investigation for which section 4 provides, is an investigation the result of which must be certified by the Secretary of Agriculture to the district attorney, and the district attorney is then charged with the duty of prosecuting for the penalties. That on its face, in my judgment, would mean that the investigation refers to a case where there is a prosecution against the person, calling for penalties, and that it is not intended to cover a suit in rem for a condemnation and confiscation of the goods. That interpretation is strengthened by the decisions I have read, that notice should be given to the person liable for the penalty, and the person liable shall have an opportunity to be heard.

I will deny the motion accordingly.

¹ Not published in Federal Reporter. See N. J. No. 1159.

Now, at the close of all the evidence in the above entitled cause and after both the libelant and the claimant have rested, comes Spielman Bros. Co., said claimant, by its attorneys, and moves the court to dismiss the libel herein for want of jurisdiction because it appears from the evidence and the files and records herein that the goods libeled herein were not seized by the marshal of this court until after the libel was filed herein and the monition issued thereon, whereas in order to confer jurisdiction on this court the said goods should have been seized prior to the filing of said libel and the issuance of said monition.

The COURT. I have already decided that question. I will deny the motion.

Now, at the close of all the evidence and after both the libelant and claimant have rested in the above entitled cause, comes Speilman Bros. Co., claimant, by its attorneys, and moves the court to dismiss the libel herein for want of jurisdiction because it does not appear from the evidence that the vinegar seized herein was shipped in interstate comerce for sale in original and unbroken packages or that said vinegar was transported in interstate commerce for sale within the meaning of section 10 of the Food and Drugs Act of June 30, 1906, under which this proceeding is had.

The COURT. I think this is covered by a decision of the Supreme Court. I will therefore deny the motion.

Motions requesting the court to find the issues generally for the claimant and to enter a special finding of fact for the claimant were also denied. The decision of the court follows:

[472] WILLARD, *District Judge*. Bulletin No. 65 of the Department of Agriculture, Bureau of Chemistry, entitled "Provisional Methods for the Analysis of Foods, Adopted by the Association of Official Agricultural Chemists, November 14-16, 1901," contains a statement by William Frear, relating to the Determination of the Source of a Vinegar, and gives some tests by which the genuineness of cider vinegar can be known. Circular No. 19 of the Department of Agriculture, issued on June 26, 1906, establishes a standard for vinegar. The evidence of the claimant in the case as well as that of the Government establishes the fact that a compound one-half of which is pure cider vinegar, and the other half something else, will answer the tests mentioned in Bulletin No. 65, and meet the requirements of Circular No. 19. Such an adulterated article which would not be pure cider vinegar would nevertheless have to be pronounced such if these tests and standards are the only ones to be applied. The tests and standards contained in other literature upon the subject published prior to 1906, are substantially those stated in the bulletin and in the circular. The testimony of the claimant's experts is based on such tests and standards. [473] It being proved that these are worthless, it follows that the opinions of such experts based on such standards to the effect that this article is pure cider vinegar are entitled to no great weight.

Is there any evidence in the case which shows some other test by reference to which the genuineness of this vinegar can be determined? The Government is not limited to the standards mentioned in the

bulletin and circular above referred to. In the trial of litigated cases the Government is not even limited to methods of analysis which may be adopted under Regulation No. 4. The question in this case being whether or not the article is pure cider vinegar, the Government can make use of any test which is an accurate one for deciding that question. Whether it is an accurate one or not must be decided by the court from all the evidence in the case. The testimony shows that practically all commercial vinegar is now made by the generator process. This process, however, is of recent origin, so recent that there is no literature on the subject. Most of the literature relating to cider vinegar has reference to other forms of production.

Does the evidence disclose any accurate test for the determination of pure cider vinegar made by the generator process? It is claimed by the Government that the testimony of the witnesses Bender and Goodnow, supplemented by that of Doolittle, does show such a test. Without discussing this evidence in detail, it may be said that Bender, while in the employ of the Government, operated commercial cider vinegar factories for several months in New Jersey, Massachusetts, and New York. He was there for the purpose of determining the constituents of cider vinegar. He made analyses every day of the cider stock before it entered the generator, and of the vinegar which came from the generator. Goodnow as an employee of the Government was at generator factories in Michigan, New York, and New Jersey. His purpose was the same as that of Bender, and he made daily analyses extending over months, as Bender did. The results of these experiments was, so far as glycerin is concerned, as follows: The maximum quantity of glycerin found by Goodnow in any sample in Michigan was 0.46, the minimum 0.24; in New York 0.31 and 0.25. Bender's results in New Jersey were maximum 0.45 and minimum 0.32. These experiments, extended through several months, in hundreds of samples, show no sample with less than 0.24 or more than 0.46 of glycerin.

Glycerin is not mentioned in any way, either in the bulletin or in the circular above referred to. The Government, with these experiments as a basis, claims that it has discovered a new test, the accuracy of which has been established by the evidence. This contention is sustained. That glycerin exists in cider stock is not denied by the claimant, though one of its experts claims that it was practically destroyed in the generator process. That claim is not in any way substantiated by the evidence nor by the literature relating to wine vinegar. The evidence in fact shows that but little glycerin is lost by passing the cider through the generator and converting it into vinegar.

The claimant's objections to this test are various. It says that no such test had ever been heard of before, and that there is nothing in [474] the literature upon the subject of cider vinegar which in any way refers to such a test. If such an objection were to prevail it would prevent the application of any new test, no matter how thoroughly its accuracy might be established. Objections as to the knowledge which Bender and Goodnow had as to the character of the stock, to the manner in which they made their experiments, and the seasons of the year when they were made, have all been considered, but they are not deemed sufficient to destroy the value of such experiments.

The evidence having established the glycerin test as an accurate one for the determination of the purity of cider vinegar, it is now to be applied to the vinegar here in question. Samples B, C, and D, were taken on February 1, 1911. The smallest amount of glycerin found in any of Bender's or Goodnow's experiments being 0.24, these samples show respectively 0.13, 0.11, and 0.13. Samples E and F, known as the composite samples, were taken May 15, 1911. They are a mixture of equal quantities taken from six barrels. These samples show respectively 0.14 and 0.16 of glycerin.

The claimant objected to the method pursued in determining the amount of glycerin, and its experts characterized that method as entirely inaccurate. Such evidence does not substantially weaken that of the Government chemists who testified to its accuracy. Moreover, the fact remains that using the same method in all these experiments, they always found a substance which they called glycerin. Applying precisely the same method to claimant's product, they found precisely the same substance, but in only one-half of the minimum quantity.

Claimant points out that the analyses of Bender and Goodnow were made as the vinegar came from the generator, while the samples in this case were analyzed, some of them six weeks after the vinegar was received in barrels in Saint Paul, some ten weeks afterwards, and some six months afterwards; but the evidence does not show that these lapses of time would materially affect the character of the vinegar stored in closed barrels.

The claim that the character of that vinegar was materially changed during that time by the formation of mother in it is not borne out by the evidence. No serious objection can be made to the manner in which the samples were taken. Even if the barrel had contained solid matter at the bottom of it, and if it had been shaken so as to mix this solid matter with the whole mass, the sample then drawn off would have been filtered before analysis, in order to get rid of that matter. The experts of the Government basing their opinion upon the application of the glycerin test, and upon other facts which appear in the analysis, particularly the high ratio between the ash and the nonsugar solids, testify that the claimant's product is not pure cider vinegar, but is a compound of about one-half cider vinegar and the other half distilled vinegar or diluted acetic acid, with the addition of other substances, the identity of which they could not determine. The opinion of the claimant's experts being based, as has been said, upon inadequate standards cannot outweigh the testimony of the Government.

It may be worthy of remark that the evidence shows that the claimant has a cider vinegar factory in Michigan, and a distilled vinegar [475] factory in Chicago; it also may be noted that the claimant presented no evidence to show whether it bought this vinegar, or manufactured it, and if it manufactured it out of what substance it was made.

The motion of the claimant at the close of the evidence to dismiss the libel, because no proceedings were instituted by the Secretary of Agriculture prior to the filing of the libel, such as are provided for in section 4 of the Food and Drugs Act is denied.

The investigation provided for in section 4 seems to refer to cases in which there is to be a prosecution under section 5 for the enforce-

ment of penalties referred to in section 2. It has no reference to proceedings for condemnation under section 10.

The amendment to Regulation No. 5, issued February 6, 1911, evidently is based upon this construction of the law, for that provides that notice shall be given in every case to the party or parties against whom prosecution lies under this act. Moreover, the necessities of the proceeding under section 10 could not abide the delay caused by an investigation such as is prescribed by section 4. While that investigation is being carried on the property might disappear, or the packages be broken and become part of the general property of the State.

The motion of the claimant made at the close of the testimony to dismiss the libel, because the property was not seized before the libel was filed, is denied. *United States v. Two Barrels of Desiccated Eggs* (D. C.), 185 Fed. 302; *United States v. George Spraul & Co.* (C. C. A.), 185 Fed. 405.

The motion of the claimant made at the close of the testimony to dismiss the libel, on the ground that it does not appear that the vinegar seized here was shipped in interstate commerce for sale in original unbroken packages, is denied. *Hipolite Egg Company v. United States*, 220 U. S. 45, 31 Sup. Ct. 364, 55 L. Ed. 364. The same case 34 Sup. Ct. Rep. 364.

The motions made by the claimant at the close of the testimony for a general finding in its favor and for special findings in its favor, are denied.

I make a general finding in this case in favor of the Government, and find that the vinegar seized under this libel, to-wit, 70 barrels, was both adulterated and misbranded.

Let judgment of condemnation and for the costs be entered against the 70 barrels of vinegar seized in this proceeding, as prayed for in the libel.

UNITED STATES v. HALL-BAKER GRAIN COMPANY.

(District Court, W. D. Missouri, July 22, 1911.)

N. J. No. 1135.

An article invoiced and sold as "No. 2 Red Wheat" held adulterated and misbranded because it was not wheat of such grade.¹

Information alleging adulteration and misbranding in violation of the Food and Drugs Act. Jury trial. Verdict of guilty on second and fourth counts.

SMITH MCPHERSON, *District Judge* (charge to the jury). [2] You have very patiently listened to the testimony introduced in this case, and the arguments of counsel. It now becomes my duty and pleasure to charge you as to the law. Under the system of jurisprudence in vogue in this country, it is the province of the jury to find the facts and base [3] your verdict upon the facts. It is the province of the court to instruct you as to the law involved. The responsibility of determining the facts is upon you, and you

¹ Reversed, *Hall-Baker Grain Co. v. United States*, p. 557, *post*.

alone. The responsibility for the law governing this case is upon me, and I alone must bear that burden. It is very important, therefore, in order that a just and true verdict may be rendered in this case and no injustice done to either party that I, in the first instance, shall give my best thought and effort to ascertain what the law is and to instruct you accurately in reference thereto. On the other hand, you can not be too deeply impressed with the responsibility that is upon you in the discharge of the responsibilities which now rest upon you in determining what the facts are. Both the Government and the defendant are entitled to insist and expect that you shall give to the solution of the problem before you your very best thought and consideration, and I have no doubt but that you are keenly alive to that responsibility and will discharge it in a most satisfactory manner.

It has been stated to you over and over again during the progress of this trial that the information filed by the district attorney against the defendant, the Hall-Baker Grain Company in his case some weeks ago, charges a violation of the act of Congress approved June 30, 1906, which law is popularly known as the "Food and Drugs Act," or "The Pure Food Law." As you are aware, this act in a general way prohibits the manufacture and sale of misbranded and adulterated foods in the District of Columbia, and in the Territories of the United States, and forbids the transportation of misbranded and adulterated foods and drugs from one State of the United States to another of those States in interstate commerce. Congress would have no right or power under the Constitution of the United States to interfere in any way with the sale and transportation of food products within the borders of a single State; but under the Constitution the power to regulate commerce among the States is vested solely in Congress, and it is because of this power given Congress by the Constitution that this law was passed and is made effective in prohibiting the sale of adulterated and misbranded foods and drugs among the States. That is to say, all matters pertaining to the sale and transportation of foods and drugs that are misbranded or adulterated and which are intended for transportation from one State to another State, is left with Congress. It is by virtue of this fact that the United States court has jurisdiction in this case.

The information filed by the district attorney charges that the Hall-Baker Grain Company, a corporation of this State, shipped and delivered for shipment on or about the 3rd day of May, 1909, a carload of wheat; that this wheat was transported by the Hall-Baker Grain Company from Kansas City, Missouri, to the Walker Grain Company located at Fort Worth, Texas. If the defendant did ship and offer for shipment the carload of wheat in question and it was transported from Kansas City, Missouri, to Fort Worth, Texas, then that is a matter of interstate commerce and the provisions of the Food and Drugs Act with respect to the misbranding and adulteration of food products applies and this court has jurisdiction.

The information in this case is quite long. It is in two counts, counts one and three having been dismissed, leaving only counts two and four for your consideration. The second count charges a misbranding of an article of food, to wit, one carload of wheat. The fourth count charges an adulteration of a food product, to wit, one

carload of wheat. The law relative to misbranding of food products, so far as it is applicable under the allegations of the information in this case, is as follows:

Sec. 8. The term misbranded as used herein shall apply to all drugs or articles of food or articles which enter into the composition of food, the package [4] or label of which shall bear any statement, design or device regarding such article or the ingredients or substances contained therein, which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory or country in which it is manufactured or produced.

And also provides that,

For the purposes of this act, an article shall also be deemed to be misbranded in the case of food:

First, if it be an imitation of or offered for sale under the distinctive name of another article.

Second, if it be labeled or branded so as to deceive or mislead the purchaser * * *.

Now under these provisions of the law the information charges "that the said wheat and article of food was offered for sale and sold under the distinctive name of another article, to wit, No. 2 red wheat, another and different article of food than the contents of said car, namely, mixed wheat." That is to say, it is the contention of the Government that the defendant in this case shipped and delivered for shipment in interstate commerce a food product, to wit, mixed wheat in bulk, which was sold and offered for sale under the distinctive name of another article of food, to wit, No. 2 red wheat. The issue, therefore, under this aspect of the case for the jury to determine is as to whether or not the defendant sold or offered for sale in interstate commerce mixed wheat under the distinctive name of another article of food, to wit, No. 2 red wheat.

The information further charges in respect to misbranding that said wheat, and article of food, was labeled and marked so as to deceive and mislead the purchasers thereof, that is to say, said wheat and article of food, was labeled and marked No. 2 red wheat when in truth and in fact it was not red wheat, but was as a matter of fact mixed wheat.

The contention of the Government in this respect being, as I understand it, that the account of sales and certificate of inspection which passed from the defendant company to the Walker Grain Company constitutes a labeling and branding of the article of food transported in interstate commerce, to wit, wheat, and that this labeling or branding was of such a nature as to deceive and mislead the purchaser. In other words, the Government contends that inasmuch as the account of sales rendered by the Hall-Baker Grain Company to the Walker Grain Company for this wheat designates it as No. 2 red wheat; that the certificate of inspection issued by the chief grain inspector of Kansas City, Missouri, a State officer, and consigned by the Hall-Baker Grain Company to the Walker Grain Company at Fort Worth, Texas, designates this food product as No. 2 red wheat, and that this constitutes a misbranding under the sub-division of foods of the Food and Drugs Act.

The above provisions of the law and the allegations of the information all refer to the charge of misbranding in this case, and I will refer more specifically to these matters hereafter in my charge and

will now proceed to quote the law with respect to the charge in the information as to adulteration.

Section 7 of the Food and Drugs Act with respect to adulteration, so far as applicable to the charges contained in the information in this case, is as follows:

Sec. 7. That for the purposes of this act an article shall be deemed to be adulterated in the case of foods:

First, if any substance has been mixed or packed with it so as to reduce or lower or injuriously affect its quality or strength.

Second, if any substance has been substituted wholly or in part for the article.

Third, if any valuable constituent of the article has been wholly or in part abstracted.

[5] Fourth, if it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

The fourth count of the information charges a violation of these four provisions of section 7 of the Food and Drugs Act in the case of foods, as follows:

(a) That other and different substances and articles, to wit, various kinds and grades of wheat, had been mixed and packed with said wheat and article of food so as to reduce, lower and injuriously affect the quality and strength of said wheat and article of food.

(b) That other and different substances, to wit, various kinds and grades of wheat, had been substituted in part for the wheat and article of food represented and pretended to have been sold and shipped, to wit, No. 2 red wheat.

(c) That a valuable constituent or part of the wheat and article of food sold and shipped, and pretended to have been sold and shipped, to wit, No. 2 red wheat, had been in part abstracted and removed, that is to say, a certain portion of No. 2 red wheat had been abstracted and removed therefrom, and a like quantity of various kinds and grades of wheat inferior and less valuable, had been substituted therefor.

(d) That said wheat and article of food was mixed and packed with other kinds and grades of wheat in a manner whereby damage and inferiority were concealed.

In other words, the information charges the violation of the four sections of the Food and Drugs Act quoted above relative to adulteration as to No. 2 red wheat.

Now to re-state to you in simpler form, if I can, the charges in the information with respect to adulteration, I have to say, that as I understand it, the Government charges that the wheat shipped and offered for shipment as detailed to you in the evidence in this case was adulterated because the defendant sold or pretended to sell to the Walker Grain Company in Fort Worth, Texas, No. 2 red wheat; that as a matter of fact there was hard wheat of various kinds mixed and packed with this No. 2 red wheat so as to reduce or lower or injuriously affect its quality or strength.

Second, the Government contends that it was adulterated because a substantial quantity of hard wheat had been substituted in part for the No. 2 red wheat and this mixture was in fact shipped in interstate commerce by the defendant company.

Third, that the wheat in question was adulterated because a valuable constituent, to wit, No. 2 red wheat, which was the article pretended to have been sold, had been wholly or in part abstracted and hard wheat substituted therefor.

And further the Government contends that the wheat in question was adulterated because it had been mixed and packed in a manner whereby damage and inferiority is concealed, that is, that hard wheats of various varieties and kinds had been mixed with No. 2 red

wheat, and that this mixing hard wheat with the soft wheat concealed damage and inferiority. This is, as I understand it, the Government's position with respect to adulteration.

As stated counts one and three of the information have been dismissed on motion of the United States attorney, leaving counts two and four for your consideration. To both counts two and four, the defendant has entered its plea of not guilty. A plea of not guilty challenges and puts in issue all material allegations in counts two and four of the information, thereby calling from the Government such testimony and evidence as to show the guilt of the defendant beyond a reasonable doubt before you can find a verdict of guilty under either of those counts. A reasonable doubt means, as the term implies, that there must be no reasonable doubt. While this is not a doubt sought after, or a [6] captious doubt, but it means such a doubt as would make you hesitate to act on and concerning some matter of importance to yourself or one of your family. If the evidence on the part of the Government has so satisfied you as to leave no reasonable doubt in the sense to which I have just alluded, then the proofs are sufficient to warrant a conviction. There is a presumption of innocence attending the defendant in all criminal prosecutions like this. This presumption of innocence stands as a fact like any other fact in the case, but by presumption is not meant a conclusive presumption or that which could not be overcome. It is simply a presumption to be given such weight as in your judgment it is entitled to receive, and you will keep in mind that you will consider this question of reasonable doubt and this presumption of innocence, and then take all of the testimony and evidence and say whether or not your mind is satisfied of the guilt of the defendant either under count two or under count four, and if you are so satisfied your verdict will be that of guilty, and if not so satisfied your verdict will be that of not guilty.

I hand you herewith four forms of verdicts, one of guilty and one of not guilty under the second count, and one of guilty and one of not guilty under the fourth count. After reaching a conclusion you will have your foreman sign one of the verdicts as to each of said counts and bring that into court as your verdict, destroying the other two forms.

The defendant in open court conceded that the wheat in question was shipped from Kansas City, Missouri, to Fort Worth, Texas, in car No. 40724 A. T. & S. F. to the Walker Grain Company, Fort Worth, Texas, and that the car was sealed and that the doors had not been opened while the car was in transit for shipment, and was in the same condition when received at Fort Worth, Texas, as when started on its trip from Kansas City, Missouri, and you will take such agreement in open court as facts without further testimony, and you will have no controversy upon that proposition of fact.

Directing your attention now to the charges in the second count of the information with respect to misbranding, you are instructed that the matter of misbranding is under two heads:

First, the information charges that the defendant is guilty of misbranding the wheat in question, because it sold and offered for sale said wheat in interstate commerce as No. 2 red wheat, when as a matter of fact it was mixed wheat. The Government contends that

No. 2 red wheat is a distinctive trade name applied to certain quality of soft wheat and is a term that is distinct and well understood by grain men, millers and elevator men throughout this section of the country, and that it has in its commercial sense a well understood meaning. The defendant, as I understand it, denies that No. 2 red wheat is a distinctive trade name applied to a particular quality of red wheat, and this forms a question of fact for you to determine. The court instructs you that if you find and believe beyond a reasonable doubt, as that term has been heretofore explained to you, that the defendant did sell and offer for sale in interstate commerce the wheat in question under the distinctive trade name of No. 2 red wheat, and that that term is well understood in a commercial sense by millers and dealers in grain, then said wheat was misbranded and your finding will be in favor of the Government upon this issue. On the other hand, if you find and believe from the evidence that No. 2 red wheat is not a distinctive trade name and is not so understood among dealers in grain, then your finding will be for the defendant as to this phase of the question of misbranding.

You are further instructed on this question as to the second subdivision of misbranding. The food in question, as you are well aware, was that of a carload of wheat in bulk, and was not sacked or in boxes, or packages of any [7] kind, but many hundreds of bushels of wheat in the one car. The Government contends that it would be a physical impossibility, or at least it would be very inconvenient, if it could be done at all, to put or print a written label on such wheat in bulk. If you find that to be so, that is to say, that it would be either impossible or most inconvenient to thus label a car of wheat in bulk, you are instructed that the label in such a case consists of the designation of the quality by an invoice sheet and by a certificate of inspection made by inspectors in the employ of the State of Missouri, and issued to the consignor, and with or separately sent to the purchaser at Fort Worth, Texas; that, within the meaning of the statute, would be the label or brand as designated by the seller to the purchaser in question of the wheat. That is to say, it is the contention of the Government that the designation in the accounts sales and in the certificate of inspection above referred to, of the wheat in question, as No. 2 red wheat, constitutes a label and brand of the wheat as No. 2 red wheat. You are therefore instructed that if you find and believe from the evidence, beyond a reasonable doubt, that the defendant, at or about the time this wheat was shipped in interstate commerce and sold or offered for sale by it to the Walker Grain Company at Fort Worth, Texas, rendered an account sales to the Walker Grain Company, wherein the wheat in question was designated as No. 2 red wheat, when, in fact, it was mixed wheat, and sent or caused to be sent to the Walker Grain Company a certificate of inspection issued by the grain inspector of the State of Missouri, and that these papers constitute a part of the transaction connected with the sale of said wheat, then the court instructs you that said wheat was misbranded within the meaning of the statute in question, and your verdict will be for the Government upon this branch of the question of misbranding. If, on the other hand, you find and believe that the account sales and the certificate of inspection were not sent to the Walker Grain Company by the defendant as a part of this transaction, and that the wheat

in question was not designated as No. 2 red wheat, then your verdict will be for the defendant upon this branch of the question.

Upon the question of adulteration, under the fourth count of the information herein, the court instructs you that the information charges, in substance, that the wheat in question was mixed with hard wheat in such a way as to reduce and lower and injuriously affect the quality and strength of the wheat; that is to say, that the defendant offered for sale and pretended to sell to the Walker Grain Company, of Fort Worth, Texas, No. 2 red wheat, when, as a matter of fact, it was mixed with hard wheat of various kinds and qualities. You have heard the testimony of the witnesses as to the grading of this wheat. It is the contention of the defendant in this matter that it did not see the wheat that it sold the Walker Grain Company, and that it did not have anything to do with the inspection thereof or the grade that was to be put upon the wheat; that this was a matter entirely within the province of the State officials of the State of Missouri, but that they had no control over that. Furthermore, that it was provided in the contract of sale that the wheat was to be sold in accordance with the Missouri inspection grades and weights. The court instructs you that this is not a matter of defense, but only goes to the amount of fine to be imposed in the event you find a verdict of guilty under this count, and if there is a conviction the amount of the fine is to be determined by the court, and with which you have nothing to do.

You can, gentlemen of the jury, very well understand why this is so. If the national pure food law is to be of any value to the people, and especially to the consumer of the food products that are shipped in interstate commerce in such large amounts throughout this country, it must not depend for its construction [8] upon State officers and contracts between elevator men and millers or other people dealing in food products, other than the consumer himself. Indeed, it is my belief that even if a national officer or employee of the Government should falsely or erroneously misbrand or adulterate a food product which is transported in interstate commerce, it would not avail the defendant as a defense, because, the question comes back for your determination; Was the wheat in question No. 2 red wheat, or was it a mixed wheat containing quite a percentage, more than 25 per cent, of hard wheat? This is a question of fact for you to determine from all the evidence that has been introduced in the case. If you find that the No. 2 red wheat was thus mixed with hard wheat of various kinds, then the court instructs you that it was adulterated within the meaning of this law and your verdict will be for the Government upon that issue under the fourth count herein. If, on the other hand, you do not believe from the evidence, beyond a reasonable doubt, that the wheat was mixed with hard wheat in sufficient quantities to make it of a lower grade than No. 2 red wheat, then your verdict will be for the defendant.

There are three other charges of adulteration which are all practically the same. The first of the remaining three charges that if any substance has been substituted, wholly or in part, for the article sold, or if any valuable constituent of the article has been wholly or in part abstracted, and third, if it has been mixed whereby inferiority has been concealed, then there is adulteration. These three matters are all practically the same thing, stated in different ways. If hard

wheat was mixed with the No. 2 red wheat, then, in that sense, hard wheat has been substituted in part for the article sold. Again, if No. 2 red wheat has been taken out and replaced by hard wheat, then a valuable constituent of the article has been abstracted in part, and likewise, if hard wheat has been mixed with the No. 2 red wheat in a manner whereby inferiority is concealed, then it has been adulterated within the meaning of the act. But, whether or not the mixing of hard wheat with soft wheat does conceal inferiority, is a question of fact for you to determine, and if you find and believe from the evidence, beyond a reasonable doubt, that such is the case, then your verdict will be for the Government upon this branch of the case. If, on the other hand, you do not believe that the mixing of hard wheat with the No. 2 red wheat does conceal inferiority, then your verdict will be in favor of the defendant upon that issue.

The defendant herein is a corporation, but you will have no prejudice against it by reason of that fact, and you will not show it any consideration by reason of that fact. But it is entitled to the same fair trial, neither more nor less, than if the defendant was an individual instead of being a corporation.

Many of the States have pure food and drug acts of their own. You see readily that the act of the State legislature, however, cannot be operative against a shipment from Missouri to the State of Texas, as is charged in this case. Therefore, the Congress of the United States, in its wisdom, enacted a national Pure Food and Drugs Act which was approved by the President of the United States June 30, 1906, having now been in force for practically four years and a half. These pure food and drugs acts are for the purpose of enabling the consumer to get and receive what he orders and desires to receive. If the housewife and the servant girl who prepare foods, and the bakers, are of the opinion and believe that No. 2 red wheat is a soft wheat and makes a whiter flour and the product of which, when made into pastry or crackers or biscuits, is more attractive, or superior in quality, or more appetizing to those who are to eat the same, and if they order the flour made from such wheat and are willing to pay for the same, they have the right to receive the same when they order it. And it is the purpose of the act of Congress of June 30, [9] 1906, to protect the consumer in that right. The question is not whether hard wheat or mixed wheat will make a flour as nutritious as the soft wheat flour. The question is not whether hard wheat flour or mixed wheat flour is harmful as compared with the soft wheat flour. The consumer has the right to have what he wants to have that is obtainable and he is willing to pay therefor.

The defendant contends that it sold the wheat under a contract with the Walker Grain Company at Fort Worth, Texas, as No. 2 red wheat, and that it, the defendant, did not know but that such wheat was being shipped in the car, number as before stated, and that it, the defendant, had no intention of shipping any other quality or variety of wheat than No. 2 red wheat. But such contention, though you may agree with that contention, does not avail the defendant herein as a defense. And that is so because the question is under the fourth count as to adulteration, as well as under count two as to misbranding: Did the defendant ship, in interstate commerce, in the car of wheat in question, from Kansas City, Missouri, to Fort Worth, Texas, No. 2 red wheat, or did it ship the car of wheat, the

same being mixed, a part of it No. 2 red wheat, and 25 or a greater per cent thereof hard wheat? And if, regardless of what defendant believed about it, the car was one of mixed wheat as before stated, then it is guilty of adulteration, providing you find the other elements entering into the question of adulteration and misbranding are present and appear, beyond a reasonable doubt, from the testimony in the case as hereinbefore stated.

This is an important case, although the penalty is small. This statute, like all other statutes, is to be enforced if the facts warrant it. If the facts do not warrant it your verdict will be *not guilty*, but if you are satisfied from the evidence that the facts warrant it, you will say so by your verdict. You will not treat the case lightly, but seriously and thoughtfully, giving it your very best judgment, regardless of whom it pleases and who are displeased, showing no favors to either side. Your verdict should express the truth.

UNITED STATES v. BETTMAN-JOHNSON CO.

(District Court, S. D. Ohio, October 6, 1911.)

N. J. No. 1664.

Cherries, packed in a liqueur or cordial prepared in imitation of Maraschino, held misbranded because labeled "Maraschino Cherries."

Information alleging two violations of section 2 of the Food and Drugs Act. Motions to quash informations overruled. Demurrer to informations overruled. Jury trial. Verdict of guilty. Motions in arrest of judgment and for new trial overruled.

SATER, *District Judge* (charge to the jury). [3] These are important cases, as are all criminal cases. In reaching a conclusion you will not be controlled or influenced by the fact that there is, or may be, a large sum of money invested in the manufacture of the product in question. The case is to be determined according to what is right, not according to the amount involved. It arises under the Pure Food and Drugs Act, whose purpose is to prevent deceit and false pretenses in the sale of foods and drugs, and to safeguard the public health.

The charge is that the article of food produced by the defendant is misbranded. Under the act an article of food is deemed to be misbranded if it be an imitation of or offered for sale under the distinctive name of another article, or if it be labeled or branded so as to deceive or mislead the purchaser, or if the package, or container, or its labels, should bear any statement, design, or device regarding the ingredients or substances contained therein, which statement, design or device shall be false or misleading in any particular. To that there are some exceptions, but we are not interested in them in this case.

You are the triers of the facts of this case; the Constitution makes you such. You are to determine what the facts of this case are, as developed by the evidence given before you.

In the course of the trial, and in the closing argument, counsel stated their recollection and understanding of the facts. In its

charge the court will refer to some—not all—of the facts, for the purposes of illustration and to bring to your minds the issues involved, but you are to use your recollection of what the evidence is, not the recollection of the lawyers or that of the court. You are to consider the whole of the evidence and to determine the issues from the whole of the evidence. In so far as the arguments of the lawyers aided you in analyzing and understanding the evidence, you should avail yourselves of their assistance, but the recollection of it must be yours, and not that of the lawyers or of myself.

In the course of argument allusions were made to the law by counsel. You take your law from the court, and not from the lawyers.

You are the judges of the weight of the evidence and of the credibility of the witnesses. In determining what weight and credibility you will give to a witness, you should consider his opportunities for knowing of matters concerning which he testified; his intelligence; his conduct on the witness stand; the probabilities or improbabilities of his statements; his prejudice or interest, if any, in the result of the suit; whether he is corroborated or uncorroborated; whether he is contradicted or uncontradicted in his evidence; in short, all of the facts and circumstances which reflect on his credibility, and then determine what weight you will give to his statements.

The defendant is presumed to be innocent. This presumption is a fact to be considered in this case along with all of the other facts. It runs in its favor as to every element of the crime charged, and abides with it throughout the trial until removed beyond a reasonable doubt.

To convict, the Government must convince you, and each of you, of the guilt of the defendant beyond a reasonable doubt. A reasonable doubt must be a substantial doubt arising out of the evidence of the case. It is not a mere conjured up, imaginary doubt, but a doubt for which a reason can be given; such a doubt as would exist in the mind of a reasonable man after a free, full, fair consideration of all the evidence. But the law does not exclude all doubt, because absolute certainty is not possible.

[4] You are to pass upon two cases. They have been tried together and are to be considered on the evidence which was given before you.

It is admitted that the defendant shipped and caused to be shipped and delivered the articles named in the respective information to the respective parties named in them. They were shipped from one State to another, and passed thereby into interstate commerce. It is also admitted that the bottles so shipped and delivered were branded as set out in the information. Some of the bottles are offered in evidence, and will be subject to your inspection.

The charge which the Government makes is that the article of food contained in the bottles was misbranded in the following particulars: That it was offered for sale and sold under the distinctive name of another article of food, namely, maraschino cherries, when, in truth and in fact, the article of food was not maraschino cherries and did not consist of cherries packed or preserved in genuine maraschino liqueur or cordial, but that the cherries were packed or preserved in a liqueur or cordial made in imitation of the genuine maraschino, a liqueur or cordial which originated and is produced in Dalmatia,

Austria; that the article of food in question was labeled and branded so as to deceive and mislead the purchaser thereof, in that it purported to be and was represented to be maraschino cherries, or cherries packed in maraschino, or preserved in maraschino liqueur or cordial, while in fact the article of food was not maraschino cherries, and was not packed or preserved in maraschino liqueur; that the label and brand on this article of food bore a statement regarding the article itself and its ingredients and substances which was false, misleading and deceptive, because it purported and represented such article to be maraschino cherries, or cherries packed in maraschino liqueur or cordial, which liqueur or cordial originated in Dalmatia, Austria, whereas, in fact, the cherries were not maraschino cherries and did not consist of cherries packed or preserved in genuine maraschino liqueur or cordial.

Such are the charges made in the respective informations. To the charges which the Government has undertaken to prove the defendant has entered a plea of "not guilty," and that puts in issue each and every one of such charges.

There grows in Dalmatia, in Austria, a small, dark-colored, bitter cherry with a rather large stone. There may be some variation in the evidence as to the description of the cherry, but you will recall the evidence and be guided by it. The cherry is not edible; at least, not much eaten. It grows on a small tree in places which one of the witnesses, at least, has said are barren. It does not grow in orchards. The Government has introduced evidence to show that the tree is indigenous to Dalmatia, and that efforts to transplant it have not been successful, and that the cherry loses flavor when transplanted. The cherry which grows on the tree is called the marasque cherry. From the pulp of the cherry and the leaves of the tree, so the witness Koch states, is distilled maraschino. Bodman further testified that maraschino is produced from the cherry and the leaves and bark of the tree.

Maraschino is not a cherry. It is a liqueur or cordial high in alcohol, the percentage of which has been variously stated by different witnesses, some giving as high as seventy per cent. Its characteristics, of course, you will determine from the evidence. There is also evidence to show that it has a peculiar flavor; the fact as to that you will also determine from the evidence. Bodman wished to purchase, so he has told you, three thousand gallons of maraschino, and that the capacity of the producing distilleries was such that from twelve to fifteen thousand gallons could have been furnished. He named four distilleries of which he learned while in Dalmatia, three of which, as I [5] recall his evidence, he visited. The witness Koch named six, and testified that the liqueur or cordial is drunk as a beverage, and described the use of paper discs which are used to preserve as long as possible the flavor. Bettman has testified that it can not be drunk, or at least that it is not used as a beverage. His precise statement you must yourselves determine. It is for you to say which of these two witnesses you believe—which had the best knowledge of its use as a beverage.

The liqueur or cordial maraschino was originally made in Dalmatia a long time ago, and it has been stated here that two of the houses still in existence and producing it are more than a hundred years old.

There is evidence that considerable quantities of the cherries have been dried and exported, mainly to Germany, and that the liqueur or cordial maraschino has been exported to various countries which have been named in your presence. Bodman testified that he bought a quantity of it to be used in his business at Ludlow, Kentucky, and that in the use of it he reduces the percentage of alcohol from about seventy per cent to one per cent. Bettman told you of his inability to find it in this city some time ago but did find some in New York and purchased it. If this occurred, however, after the information was filed, then you should not consider his purchase as reflecting on the extent of the commercial use of maraschino before the suit was brought. You should so consider the evidence of Bodman also, if his purchase occurred subsequent to the filing of the information. Brachman, a Cincinnati merchant, testified that he has handled Luxardo's maraschino since 1873, but that the sales have been limited. The witness Hart testified that he bought maraschino twice, that he had the maraschino distillate five or six years ago and had seen a few bottles of the maraschino cherries. Hilts conducted examinations of maraschino, perhaps half a dozen of them, he says, in 1909; that in some of the samples that he examined in his study of maraschino he found it present, and in others he did not; that that which was made by Luxardo, of Zara, was strong, genuine maraschino, Thomas testified to assistance rendered his father, an importer of wines, liqueurs, and the like, while doing business in San Francisco, which assistance extended down to about the year 1897. He detailed to you what his services were and that he sampled everything that was bought in that business. He said that for the purposes of that business there were imported both French and Dalmatian maraschino; that cherries in maraschino were also imported by his father and also cherries which were designated as "Cherries au Marasquin."

The evidence has thus been reviewed to reflect on and call your attention to the extent of the commercial use of maraschino and to its properties. I do not pretend to call your attention to all of it, but you will consider all of it, whether reviewed or not; and you will, as I have heretofore said, determine the value of the evidence of each witness.

The defendant claims, as I understand, that the tree which grows in Dalmatia and yields the marasque cherry of that country is not indigenous, but that it grows elsewhere. You will determine from the evidence whether or not the same tree that grows in Dalmatia, the same kind of cherry that grows there, is found growing in other countries.

You will also determine from the evidence whether maraschino is produced in other countries or not, and whether, if it is so produced, it is the same article, the same character of article, as that produced in Dalmatia.

The defendant's position is substantially this: It admits that the cherries used by it and its predecessor partnership are not and have not been maraschino cherries. The cherries used by the defendant in its business are obtained [6] in Greece, France, some of the Western States, and perhaps elsewhere; the names of some of them have been given you, as Queen Anne, Royal Anne, Bigarreux, etc. There is no maraschino used in the manufacture of the defendant's article.

It is not present at all. The cherries used by the defendant were shipped here in brine, and sulphur in some form appears to be present in such brine. They are washed and prepared in a manner that I do not understand, but which is not important in the determination of these cases. The effect of the early treatment of them is to render them colorless, and if not tasteless, then so as to remove a portion at least of the taste. They are then colored red, and are placed in a syrup or liquid and a bitter flavor is given them by the use of almonds or oil of bitter almonds, whichever it is.

As I recall the evidence, there is no such cherry grown or known in fruit growing as maraschino cherries—no natural product which bears that name. There is evidence here, given by Thomas, that the article prepared by the defendant does not have the taste or flavor of maraschino, but that both the defendant's article and the true maraschino have a bitter taste. The defendant's article, if I recall the evidence rightly, has no alcohol present. In maraschino there is alcohol. The defendant's product has gone into extensive use in many ways which have been named in your presence. The article is produced and sold annually in large quantities. The manufacture of it began in 1894. The manufactured product was called Maraschino Cherries and has been known by that name ever since. Bettman says that the name was applied as an arbitrary name, as a fanciful name. Keifer, if I recall his evidence correctly, stated that it was made to imitate the French article; that there was an analysis made of the French article to determine its composition, with a view to manufacturing a similar product.

As I have said heretofore, the record fails to show any cherry that is a natural product which bears the name of maraschino cherries. Such a cherry is not known in cherry culture. The defendant, in its use of cherries, has not limited itself to any one kind of cherry. It does not use the marasque cherry. It claims that its cherries are the principal thing in its product and that the syrup may be thrown away. Its position is that it gave a name to its cherry which is unlike and different from the name of any cherry ever theretofore known or sold, and that it first applied the name maraschino cherries; that no cherries packed or preserved in genuine maraschino have ever been known as maraschino cherries; that when it applied the term maraschino to its cherries that term had never been applied to any natural cherry or treated cherry; that their article went into extensive use and became known and used in this country and elsewhere as maraschino cherries; that in commerce, and so far as the public is concerned, the name maraschino cherries, as used by it, is a true name, and not suggested by any other cherry than their own product, and that it is consequently not a fraud or deception or a misleading name; that the term maraschino means, and has come to mean, something else than the distillate of the marasque cherry, and that this is on account of the extensive use of defendant's product, and on account of what the defendant claims is the style or custom of to-day, and of the little knowledge of the genuine maraschino, and the small supply available for use; that their product named Maraschino Cherries is a food product, a fruit in a liqueur or cordial prepared for such fruit.

Such are the claims made in behalf of the defendant; and if you find that the claims so made are sustained, you need go no further,

but return a verdict for the defendant. If you do not find the defendant's claims sustained, then you must go further and consider in detail the claims of the Government, and I shall now proceed to state them.

[7] The Government claims that maraschino is a liqueur or cordial first made in Dalmatia; that it entered largely into commerce, into that of European countries which have been named and also into the commerce of this country, and that it thereby became known to dealers; that it possesses a peculiar and distinguishing flavor of its own; that when the term "maraschino" is applied to an article it carries by implication the meaning and is understood and has been understood to mean an article packed or preserved in and possessing the flavor and qualities of maraschino; that the cherries of the defendant are not maraschino cherries, as known as a natural product and in fruit culture; that they are not the marasque cherry, from which maraschino is made; that no maraschino whatever is used by defendant in connection with its product, and that no such thing as maraschino cherries is known, as I have just said, in fruit culture or as a natural growth; that the product of defendant has neither the flavor nor quality of maraschino, and that the application and use of the term maraschino to and in connection with the word "cherries" imports and suggests that the cherries are cherries from which maraschino is made—that is to say, marasque cherries—or that the defendant's product is packed and preserved in maraschino and that such is the common understanding, the ordinary purchaser's understanding; that in the commercial world maraschino is so well known, its quality and characteristics so well understood, its name so distinctive, that it occupies a field by itself, and that the name maraschino is limited to the liquor, or liqueur, or cordial, called maraschino, and that the name has never acquired a general, or more general, or different meaning than that arising from its being associated with the distillate of marasque cherry; that the name maraschino could not be appropriated by the defendants, or others, or any other article, without misleading the public; that the name maraschino is the name of a real, genuine, valuable article of commerce, never applied to a natural cherry with natural color and flavor, or to a cherry which, by its earlier treatment, loses its color and flavor and then by subsequent treatment is given color and flavor in preparation for the market, some of the original flavor being perhaps retained, notwithstanding the treatment in shipping and the effect of sulphur, as well as the brine.

The Government claims that the appropriation of the name conveyed and does convey the belief that defendant's article possessed and possesses the flavor of original marschino; that the name was applied to cherries which have none of the characteristics of maraschino to induce the belief that those qualities are present, and that such use of the name is a misnomer and the placing of it on the label is a misbranding, and that the misbranding is done to deceive and mislead the purchaser into the belief that he is buying an article possessing the characteristics and qualities contained in true maraschino, when in fact he is not. The ordinary purchaser is one who gives such attention to the article he wishes to buy as could be reasonably expected, and it is that kind of a purchaser which the Govern-

ment claims is misled. It claims that the statement and name on the defendant's labels are false, misleading and deceptive as regards the cherries—the article of food—and the substance or ingredients which compose or enter into it and the liquid which surrounds such cherry; that the term “maraschino” suggests an origin, character and place of manufacture, which is untrue, and leads the purchaser to believe that what he buys is a thing other than what he gets. That, as I understand, is the Government's claim; and if you find that that claim is sustained by the evidence, beyond a reasonable doubt, then it is your duty to say so, and to do so notwithstanding the length of time the defendant and its predecessor have used the name of maraschino cherries. For, if the name put on the label is a misbranding, a false, deceptive and misleading name, then its continued use would not make it legal.

[8] You will decide whose contentions are correct, and whether, under the facts and the law, defendant is guilty of a misbranding and mislabeling, or not. You will act impartially and conscientiously. When you retire to the jury room you will name one of your number as foreman, and when you have reached a conclusion you will report your verdict.

UNITED STATES *v.* DR. J. L. STEPHENS CO.

(District Court, S. D. Ohio, October 10, 1911.)

N. J. No. 1891.

Drug products sold as a cure for drug habit, *held* misbranded because labels failed to bear statement showing the quantity or proportion of morphine and alcohol contained therein.¹

Information charging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty by direction of the court.

AGREED STATEMENT OF FACTS.

[2] That since March 4, 1907, Dr. F. E. Crosier, president and medical director of said company, has had charge of the Sanitarium owned and conducted by said defendant company, and has had charge of all the patients at said sanitarium, and also all patients that have been treated away from the institution by correspondence. The said Dr. Crosier is a graduate of the medical department of Columbia University, New York City, and was licensed to practice medicine by the University of the State of New York, on the 10th day of July, 1894, after an examination by the New York State Regents. He served on the surgical staff of Bellevue Hospital for eighteen months, and on the medical staff of the same hospital for six months. He is a member of the society of “Some of the Alumni” of Bellevue Hospital. Later, he served six months on the staff of the Lying-in Hospital in New York City. He practiced medicine in Springfield, Massachusetts, for a short time. He was appointed Acting Assistant Surgeon of the United States Army during the Spanish-American War and served in Sternberg Hospital, Chicka-

¹ Affirmed, *Dr. J. L. Stephens Co. v. United States*, p. 628, *post*.

mauga Park. On the 5th day of April, 1904, after examination, he was licensed to practice medicine in the State of Ohio, and since [3] that time he has been engaged in the practice of his profession at Lebanon, Ohio. For years he has made a specialty of treating patients addicted to drug and liquor habit.

The defendant company has no proprietary medicines, nor does it put up or offer any medicines to the general public. Its medicines, nor its prescriptions for medicines, are not for sale at any drug store or other place whatsoever. They are not put up or kept for sale by the defendant company, or delivered to any other party or parties for administering to patients generally, who are afflicted with the drug habit, nor can any person afflicted or claiming to be afflicted with the drug habit send to the company, or to anyone connected with the company, and buy a stock remedy or proprietary medicine for the cure of the drug habit.

In every case where the patient applies for treatment either at the Sanitarium or at the patient's home, a history of the patient's case is first obtained from the patient, from which a diagnosis is made and a prescription written by the medical director as the examining physician, to meet the needs of the particular case then under consideration which prescription is then filled by the medical director, or under his immediate direction. Persons addicted to the drug habit have frequently made application to the defendant company for medicines, asking that the same be sent them without first submitting the facts and necessary data concerning the patient's habit, condition of general health, previous history, etc., from which an intelligent diagnosis of their case could be made, and from which the physician in charge could prescribe for their particular case, and the defendant company has always refused to prescribe for such persons or furnish any medicines until the patient could furnish the necessary facts from which the examining physician could intelligently prescribe for their individual cases. The defendant company has frequently been applied to by persons claiming to be afflicted with the drug habit to furnish them with sample, or trial packages of their remedies, but have always refused, as their treatment was that of a regular practicing physician, and sent out only on prescription for each individual case.

The package of medicine referred to in first count of the information, was shipped by the defendant company under the following conditions and circumstances:

On November 30, 1908, a person signing himself A. Stengel, and giving his address as 1415 Chapin Street, Washington, D. C., sent a communication to the defendant company, inquiring about its treatment of the morphine habit, expense of same, etc. This communication was answered on December 5, 1908, and other correspondence followed. The said A. Stengel endeavored to get the defendant company to forward him medicines for curing the morphine habit without submitting to its medical director and physician in charge a full statement of his physical condition, health, symptoms, effects of the habit upon him, etc. The defendant company refused to prescribe for him or to receive him as a patient without such complete statement. The result of the correspondence was, that the said A. Stengel furnished the required information, and after a diagnosis of his case,

a prescription was made and entered upon the prescription ledger of the company, the medicine put up in accordance with said prescription by the medical director of the defendant company, and the same was sent to him by express, December 15, 1908.

The package of medicine referred to in the second count of the information was shipped by the defendant company under the following conditions and circumstances:

On November 5, 1908, the defendant company received a communication from a person signing himself, L. F. Kay, and giving his address as Washington, [4] D. C. Said communication was in fact from Dr. L. F. Kebler, Chief of the Division of Drugs, Bureau of Chemistry, United States Department of Agriculture, the name of "L. F. Kay," having been assumed by him for the purpose of obtaining evidence. The first communication being an inquiry concerning the defendant company's treatment of the drug habit. Several communications passed between the date of the said L. F. Kay's first inquiry, and October 20, 1909, when the defendant company accepted him as a patient and sent him medicine for a course of treatment for the morphine habit. This medicine was prepared and sent by the medical director and physician in charge of the defendant company, after he had diagnosed the case of the patient, the prescription having been made and entered upon the prescription ledger of the defendant company prior to the preparation and shipment of the medicine as aforesaid.

At the time of the Spanish-American War, when the Government imposed a tax upon all proprietary medicines, an official of the Government examined the sanitarium, the books of the defendant company, and its methods of doing business, and decided that the medicines prescribed and put up for its patients were not amenable to the revenue tax, and no revenue tax has ever been paid by said defendant company on its preparations.

It is a recognized fact by the medical profession generally that in the treatment of diseases, especially the drug habit, it is an important and in most cases a vital factor, that the patient should not know the composition of the medicines given in such treatment.

In the treatment of the morphine habit and of other drug habits of a similar character, and which constitute the main business of the defendant company, it is generally accepted and recognized and followed by the medical profession as the proper medical treatment to diminish the amount of the drug taken, without the knowledge of the patient, at the same time correcting nervous, digestive or other effects of the habit by proper proportion of medicines generally combined with the drug against which the treatment is directed.

These prescriptions attached to "Exhibits A and B" herein, when filled, constitute a course of treatment for the morphine habit, based on the gradual reduction plan; they also embody combination of drugs calculated to overcome the effects of the morphine used, and while regularly diminishing the amount used, tend to correct the disordered conditions and restore normal health.

The alcohol contained in the compound is not for any therapeutic use whatever; on the contrary, it is used only in very small amount, as the analysis shows, to prevent fermentation and to insure against freezing.

SATER, *District Judge* (directing verdict for the Government). This case is submitted upon an agreed statement of facts. Each party asks for a directed verdict.

The defendant's first contention is that the information is defective and insufficient, because it alleges that each of the bottles shipped to the vendee was misbranded, whereas, it should have been alleged that the larger package, of which each bottle was a part, was misbranded.

[5] A number of bottles of the article in question were shipped together as a single shipment. They went forward through the channels of interstate commerce as a single bundle or package, surrounded by some sort of a cover. The information charges that each individual bottle was mislabeled and misbranded, and not that the enclosing cover of all of the bottles was mislabeled or misbranded.

The first sentence of the second section of the Pure Food and Drugs Act provides:

That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country or shipment to any foreign county of any article of food or drugs which is adulterated or misbranded, within the meaning of this act, is hereby prohibited.

The paragraph then recites that "Any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this act" shall be punished as is thereafter set forth. For the purposes of this case, the other portions of the section need not be noticed.

This section prohibits the introduction into interstate commerce of any article of food or drugs which is adulterated or misbranded within the meaning of the act. It also penalizes the shipment or delivery for shipment from any State or Territory or the District of Columbia, of any such article so adulterated or misbranded within the meaning of the act.

The verbs "ship" and "deliver" are both transitive and call for an object. The object is found in the words, "any such article so adulterated or misbranded within the meaning of this act." The antecedent of "such" and "so" is found in the first sentence of the section, in the words, "any article of food or drugs which is adulterated or misbranded within the meaning of this act." If I should be wrong in this, and if the object of the transitive verbs "ship" and "deliver" should be found further along in the section, in the words, "any such adulterated or misbranded food or drugs," the meaning would not be changed. I do not think, however, that I am mistaken as to the grammatical construction.

The section also imposes a penalty on the vendee or consignee who, having received, delivers in original unbroken packages for pay or otherwise, or offers to deliver to any other person, any article adulterated or misbranded within the meaning of the act. The law

contemplates the punishment of two classes of persons. This construction accords with that put upon the section by the Supreme Court in *Hipolite Egg Co. v. United States*, decided March 13, 1911.¹ In that case an adulterated article was involved. The court said:

Section 2 of the Food and Drugs Act prohibits the introduction into any State or Territory from any other State or Territory of any article of food or drugs which is adulterated, and makes it a misdemeanor for any person to ship or deliver for shipment such adulterated article, or who shall receive such shipment, or, having received it, shall deliver it in original unbroken packages for pay or otherwise.

[6] It was also said in that case:

The object of the law is to keep adulterated articles out of the channels of interstate commerce, or, if they enter such commerce, to condemn them while being transported, or when they have reached their destination, provided they remain unloaded, unsold or in original unbroken packages. These situations are clearly separate, and we can not unite or qualify them by the purpose of the owner to be a sale.

It will furthermore be noted that the statute declares that it is one "—for preventing * * * the transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein."

The words, "package" and "original unbroken package," are both used in the act. The word "package" is not used in the same sense as "original unbroken package." The framers of the act manifestly had in mind the definition heretofore given by the courts to the term "original package," and in the second, third and tenth sections have used that expression, or its equivalent. It is used in those sections with reference to the situations which arise where the article transmitted has reached the vendee or consignee, but has not yet become a part of the general property of the State in which the vendee or consignee lives. The package still being unbroken, and not having become a part of the property of the State, remains subject to Federal control. The article, if thus found, is subject to seizure and may thereby be prevented from reaching the ultimate consumer.

The word "package" is repeatedly used in this act without any modifying adjective or other qualifying term. It is in such instances to be taken in its broad sense. The word "package" as thus used means the package made up by the manufacturer for sale to the ultimate consumer, which goes into the possession of the person who will use the article of food or drugs.

In the portion of section 7, which deals with drugs, the statute recites in the proviso:

That no drug defined in the United States Pharmacopœia or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality, or purity be plainly stated upon the bottle, box or other container thereof although the standard may differ from that determined by the test laid down in the United States Pharmacopœia or National Formulary.

What does that language import, if it does not mean the particular receptacle of drugs which the person intending to use the drug buys along with the drug, as its container?

It means the bottle, or box, or other container, whatever it may be.

How can a person who wishes to buy a drug determine what the actual composition or character of the drug is, unless there be upon

¹ 220 U. S. 45, p. 378, *ante*.

the bottle, or box, or paper, pasteboard, or other container, i. e., on the package, of whatever material it may be, the information which the law says he shall have?

The bottle, box, container, or package, in whatever form it may be, may have reached the druggist encased in a great wooden box, for instance, along with a great number of other bottles, boxes, containers or packages. The ultimate consumer may never see, and in fact rarely does see, the large box encasing the individual packages. The label or inscription put upon the large box—the box enclosing the bottles, boxes, or containers sold by the retailer—will afford no protection to the purchaser. He must look to the bottle, or box, or container that he buys for the thing that he buys.

[7] The same section provides that food shall be considered adulterated:

If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health: *Provided*, That when in the preparation of food products for shipment they are preserved by any external application applied in such manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the covering or the package, the provisions of this act shall be construed as applying only when said products are ready for consumption.

This language recognizes that a food may, for its preservation in shipment, be packed in a preservative which may be removed so as to leave no deleterious or poisonous effects behind.

If the shipper puts upon the covering or the package directions for the removal of the preservative, which enable the person who receives the article for use to bring it to a wholesome condition, the shipper does not become amenable to the law. The lawmakers, in the use of this language, had in mind the ultimate consumer, rather than the person who prepares the food for use for him.

The eighth section relates to misbranding. It recites:

That the term "misbranded," as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design or device regarding such article, or the ingredients or substance contained therein which shall be false or misleading in any particular, etc.

It is common knowledge that there are many articles of food and drugs found in the hands of grocers or druggists, which the individual buys for use by himself or his family. It is from the package he buys, from the label upon such package, that he learns what the article is. If the label or brand upon it is misleading, an offense is committed. The package may have been shipped along with many other packages of the same kind in a large enclosing box or case. It is not such enclosing box or case to which the consumer looks, or about which he inquires for information.

The same section, in referring to drugs, provides that they shall be deemed to be misbranded:

If the contents of the package as originally put up shall have been removed, in whole or in part, and other contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium * * * or any derivative or preparation of any such substances contained therein.

To what package does the statute allude? Manifestly, the package that the consumer buys, the package which goes into his possession, the package originally put up for sale and use.

Under the provisions relating to the misbranding of foods, the same section (section 8) recites that an article of food shall be deemed to be misbranded:

If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of any morphine, opium, * * * contained therein.

The word "purchaser" it will be noted, is used without limitation or qualifying terms. The language quoted does not say the wholesale, retail, or individual purchasers. It does not say the purchaser who buys in order to utilize the article in some process of further manufacture or to sell to retailers. If it [8] be broad enough—and I do not say that it is not so—to include wholesale and retail purchasers, it is also broad enough to include the ultimate consumer as a purchaser, and the labeling or branding of the particular package, box, bottle, or other container enclosing the article which he buys must be such as not to deceive or mislead him.

It will not do to say that this law was framed to protect wholesalers and retailers and not the common people. Its primary purpose is the protection of the ultimate consumer. The same section further provides that an article of food shall be deemed adulterated:

Third. If in package form and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package.

Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design or device shall be false or misleading in any particular; *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of, or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations or blends, and the word "compound," "imitation," or "blend," as the case may be, is plainly stated on the package in which it is offered for sale; provided, etc.

The law does not mean that when a number of bottles or boxes are put into the channels of commerce as a single shipment, encased together in a wooden box, for instance, that the aggregate weight of all the enclosed bottles or boxes, or of each individual enclosed bottle or box shall be placed upon the enclosing wooden box and need not be placed on the individual enclosed bottles or boxes.

In whose favor does the prohibition run against any false or misleading statement, design, or device on the package or its label, regarding the ingredients or the substances contained therein? For whose benefit is the provision for labeling, branding or tagging of articles so as to indicate that they are compounds, imitations, or blends, made?

The answer to these questions, to my mind, is clear. It is the purchasing public, the ultimate consumer, whom the provisions of the statute are primarily intended to protect.

Without enlarging further, I am convinced that the word "package," as used in it, means the package which passes into the possession of the public, of the real consumer; and that the words, "original unbroken package," relate, as heretofore stated, to the package in the form in which it is received by the vendee or consignee.

The objection to the information thus far considered is not well taken.

The remaining question is this. Is a reputable, regularly licensed, practising physician, residing in Ohio, who prescribes for a person beyond the limits of the State and transmits to such person through the channels of interstate commerce the medicine prescribed, subject to the penalties of the law, if the medicine so prescribed and so passing through the channels of interstate commerce, contains morphine—the bottle, box, container, or package enclosing the medicine so prescribed and to be taken by the patient not being so labeled as to show the presence of that drug.

[9] The defendant is engaged in the business of treating persons enslaved by the morphine, cocaine, and other drug habits.

In the course of the argument reference was made to the debates in the House of Representatives when the Pure Food and Drugs Act was under consideration and when amendments were offered and voted down, to exempt from the provisions of the act the prescriptions of regularly licensed and practising physicians. The statute, like a written instrument, is to be construed by its express terms, from its four corners, as it is frequently said. It is said in 26 Am. & Eng. Ency. of Law, 638-639, that the opinions of individual legislators as to the object and effect of a statute are of little or no weight on questions of construction, and are generally inadmissible; and that while it is unquestionably a general rule that what may be called the legislative history of an act is not admissible to explain its meaning, yet in cases of doubt and ambiguity the journals of the legislature may be examined for the intent of the lawmakers to ascertain facts of which such journals are evidence. In view of the principle announced in *United States v. Delaware & Hudson Co.*, 213 U. S., 366, 414, the fact that Congress refused to incorporate in the Pure Food and Drugs Act a provision permitting regularly licensed and practising physicians to send their medicines containing morphine, cocaine, and like drugs, through the channels of interstate commerce without so labeling them as to show the presence of such drugs, is practically conclusive that it was the intention of congress that physicians should not enjoy such a privilege.

The act under consideration, however, is not so obscure as not to be susceptible of interpretation without recourse to the journals of Congress.

It makes no exemption in favor of regularly licensed practicing physicians. The purpose of the law is to prevent deceit and false pretenses in the sale of food and drugs, and to protect the public. It is aimed at imitations, shams, frauds, and pretenses of every character as regards articles of food and drugs. Its purpose is to apprise

people who buy and use drugs as to what they buy and use, and to check the use of drugs which lead to destructive habits.

In the case at bar the prescription was given to correct the morphine habit. The agreed statement of facts recites that the best way to cure such a habit is by administering, without the knowledge of the patient, morphine in steadily diminishing quantities until finally none at all is given. It is urged that if a physician may not thus prescribe, he may be thwarted in his treatment of his patient, and that thus the law will operate to the detriment of the morphine victim. The court is therefore asked to so temper the law, to so construe it, as to permit a physician of the character above and in the agreed statement of facts named, to transmit medicine, to prescribe for his patients and transmit to them medicine through the instrumentalities of interstate commerce, without apprising the patients of their use of morphine, cocaine, and other drugs named in the act.

This, however, is asking the court to read into the law a provision not therein contained. If the requested construction be placed upon it, then in every case the question will arise: Is the physician who prescribes regularly licensed, practicing and reputable?

The effect of the construction asked would be so to open the door as to permit disreputable physicians, "quacks," and the manufacturers and vendors of proprietary medicines, to place their prescriptions in the possession of the people and thus to continue the growth of the very drug habits which the law is designed to check. In the absence of any provision which exempts a regularly licensed, practicing and reputable physician from sending his medicine or prescriptions through the channels of interstate commerce to his patients without [10] labeling or branding them so as to show precisely what their contents are, I am of the opinion that such physicians are not exempt from the provisions of the act, and that a failure on the part of the defendant to so label its medicines or prescriptions as to show that one of the ingredients is morphine, constitutes an offense.

If the law as it stands, operates injuriously, relief should be sought from Congress and not from the courts.

One of the reasons for requiring the labeling or branding to show the presence of morphine, cocaine, and articles of like nature, is that people may not become addicted to the use of such drugs without knowingly acquiring the habit of using them. Medicines or prescriptions might otherwise be taken by them without knowledge of their real contents and ultimately the users have fixed upon them a habit which destroys both health and life. The law is far-reaching, but it was intended to be so.

Another question presented is, whether the Pure Food and Drugs Act deals with articles other than those which are the subject of bargain and sale. It is urged that the medicine or prescription is a mere incident of the services rendered, and that it is not therefore to be treated as an article of commerce.

There are some sections of the act, as the third, which use the words "sale, or offered for sale." If a master employs a servant, he buys the servant's labor and the servant sells it. If a client employs a lawyer, he buys the lawyer's services. The lawyer sells his services, his learning, his skill. The client buys what the lawyer offers to sell.

A physician holds himself out as ready to serve others for a consideration. In a sense he sells his services to his patient. It is common knowledge that a physician rendering services to a patient also furnishes a considerable part, and sometimes all of the medicine taken by the patient. The medicine is furnished along with, under, and as part of the contract of employment. In cities, the physician may write a prescription to be filled at a drug store, and yet it is within the knowledge of all that physicians in calling upon patients ordinarily carry with them some medicine at least for administration. There are instances, especially in cities, in which there is a separation of the drugs furnished from the employment. The patient then pays for the drugs in addition to the services rendered by the physician. But I do not understand from the agreed statement of facts that such a situation is presented in this case. The employment which a physician accepts is contractual in its nature and is sufficiently of the nature of bargain and sale to avoid the argument which is made. Moreover, the statute (Section 2), prohibits the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipments to any foreign country, of any article of food or drugs which is adulterated or misbranded within the meaning of the act.

As was said in the *Hipolite Egg Company* case, the object of the law is to keep adulterated and misbranded articles out of the channels of interstate commerce, and it is immaterial whether the medicine or prescription which was furnished by the defendant company was the mere incident of the employment, or its primary object. It is enough to know that the medicine or prescription was sent through the channels of interstate commerce, and misbranded, within the terms of the act. The information is sufficient.

On the fact submitted, the defendant violated the law, and it is therefore my duty, gentlemen of the jury, to direct you to return a verdict in favor of the Government.

After the defendant's motions for a new trial and in arrest of judgment had been denied by the court, the defendant sued out a petition for a writ of error to the Circuit Court of Appeals for the Sixth Circuit, upon the following assignments of error:

[11] ASSIGNMENT OF ERROR NO. ONE.

The court erred at the conclusion of the agreed statement of facts in overruling defendant's motion that the court instruct the jury to return a verdict in favor of the defendant, to which ruling of the court counsel for the defendant at the time excepted, for the full reasons to-wit: First. That the information herein is defective and insufficient in that it failed to charge the defendant with any offense under the statutes of United States of America.

Second. The information did not charge the defendant with unlawfully shipping and causing to be shipped and delivered for shipment, certain articles of drugs "in original unbroken packages"; but did charge that the said certain articles of drugs were unlawfully shipped and caused to be shipped and delivered for shipment "in unbroken packages."

Third. The evidence adduced as set out in the submitted statement of facts does not disclose that the defendant unlawfully shipped and caused to be shipped and delivered for shipment, certain articles of drugs "in original unbroken packages and bottles"; containing alcohol and morphine sulphate which were misbranded within the meaning of the Food and Drugs Act of June 30, 1906.

Fourth. That the aforesaid Food and Drugs Act does not apply to a reputable, regularly, licensed, practising physician who prescribes for patients beyond the limits of the State wherein he is licensed and is practicing, and who transmits to his patients through the channels of interstate commerce the medicine prescribed, if the medicine prescribed and so transmitted contains morphine and not being so labeled as to show the presence of the drug.

Fifth. That the aforesaid Food and Drugs Act applies to the giving of a prescription and the filling thereof by a reputable, regularly licensed, practising physician.

ASSIGNMENT OF ERROR NO. TWO.

The court erred, at the conclusion of the reading of the agreed statement of facts in granting the motion of the plaintiff to direct a verdict in favor of the plaintiff, to which ruling of the court counsel for the defendant at the time excepted, for the reasons assigned under the first assignment of error herein.

ASSIGNMENT OF ERROR NO. THREE.

The court erred, in holding that the terms "original unbroken packages" in section 2 of the Food and Drugs Act aforesaid, applied only to the vendee [12] and consignee, and not also to the person who shall ship, cause to be shipped, or deliver for shipment any article of food or drugs which is adulterated or misbranded within the meaning of said act, to which holding of the court counsel for the defendant at the time excepted.

ASSIGNMENT OF ERROR NO. FOUR.

The court erred, in holding that the aforesaid Food and Drugs Act in relation to the adulteration or misbranding within the meaning of said act applies to other than, "original unbroken packages," to which holding of the court counsel for the defendant at the time excepted.

ASSIGNMENT OF ERROR NO. FIVE.

The court erred, in holding that the word "package" as used in the aforesaid Food and Drugs Act, applied to drugs meant other than "original unbroken packages," to which holding of the court counsel for the defendant at the time excepted.

ASSIGNMENT OF ERROR NO. SIX.

The court erred, in holding that the aforesaid Food and Drug Act applied to a reputable, regularly licensed, practising physician who prescribes for a patient beyond the limits of the State wherein he is licensed and is practicing and who transmits to his patient through the channels of interstate commerce the medicine prescribed, if the medicine so prescribed and transmitted contains morphine and not being so labeled as to show the presence of the drug, to which holding of the court counsel for the defendant at the time excepted.

ASSIGNMENT OF ERROR NO. SEVEN.

The court erred, in holding that the aforesaid Food and Drugs Act applies to the giving of a prescription by a reputable, regularly licensed, practising physician and the filling of the same, to which holding of the court counsel for the defendant at the time excepted.

ASSIGNMENT OF ERROR NO. EIGHT.

The court erred, in holding that the giving of a prescription by a reputable, regularly licensed, practising physician and the filing of the same is the subject of bargain and sale, to which holding of the court counsel for the defendant at the time excepted.

ASSIGNMENT OF ERROR NO. NINE.

The court erred, in rendering judgment against the defendant upon information No. 777, to which counsel for the defendant at the time excepted.

UNITED STATES v. MOHN WINE CO.

(District Court, W. D. Michigan, October 11, 1911.)

N. J. No. 1895.

In prosecutions for violation of section 2 of the Food and Drugs Act, instituted by the U. S. Department of Agriculture, *held* to be a condition precedent to such prosecution that the defendant be given notice and an opportunity to be heard as provided in section 4 of the act.¹

Information charging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of not guilty by direction of the court.

DENISON, *Circuit Judge* (directing verdict of not guilty). [2] In this case I have been requested by counsel for the defendant to direct you to render a verdict of not guilty, and for reasons which I do not need to state at large, at this time, I am constrained to hold that it is my duty to so instruct you.

The ground or basis of such instruction is, in a way, technical; in another way, there has been an invasion of a substantial right on the part of this defendant—a right given to him by the act of Congress under which this prosecution is had.

It appears by the undisputed evidence in this case that this defendant did introduce into interstate commerce a certain number of bottles of grape juice manufactured by it in this State and shipped by it, by the Michigan Central Railroad, to Chicago, Ill. That would constitute interstate commerce. It also appears by the undisputed evidence in the case that the bottles containing the grape juice were labeled "Grape Juice. Pure, unfermented, thrice sterilized." It also appears by the proofs in the case that there had been added to the grape juice a foreign substance, consisting of granulated cane sugar; that the purpose of adding cane sugar to the grape juice was to make it of a uniform degree of sweetness. It does not appear that the addition of cane sugar to grape juice made an injurious or deleterious product.

The act of Congress provides that any person who shall introduce into interstate commerce any food product that is misbranded or adulterated will be guilty of a misdemeanor, and if convicted shall be punished. The act also provides what shall constitute adulteration of a food product and what shall constitute a misbranding. It is a misbranding of a food product to put a label upon a case or bottle which in any way misleads or will mislead the purchaser; and the test is, would the ordinary layman, the purchaser, be misled by the label upon the package from a casual observation of the same. If he would, that is a misbranding. If he would not, it is not a misbranding. The act has been passed for the protection of consumers and purchasers.

It is not necessary, to constitute a misbranding, that the substance which is defined in the label should be injurious to health, or in any way. It is sufficient if there is something contained in the product which the label misleads. In other words in this case, this grape juice was labeled "Pure unfermented grape juice." That label was misleading, because under the undisputed evidence in this case it was not

¹ Contra, *United States v. Morgan et al.*, p. 494, *post*.

pure grape juice. It had added to it a foreign ingredient, something not derived from the grape, something not contained in the juice of the grape. There had been added to it cane sugar, which is not derived from the grape; and the purpose of the act is that the purchaser may know what he is buying; then he can purchase it or not, as he sees fit, but he is entitled to know and he is entitled not to be misled or deceived as to what he is buying.

[3] So that I have not any question but what the act of this defendant in introducing into interstate commerce this grape juice, the bottles containing which were labeled in the manner shown by the evidence, constituted a violation of this act.

It is also the claim of the Government in this case that the grape juice which was shipped from this State to the State of Illinois by the defendant was not unfermented. It is the contention of the Government that at the time of the shipment this grape juice was partially fermented. If that were true, it was a violation of this act, it was a misbranding. If the case were to be submitted to you that would be a question of fact for you to determine from the evidence in the case, as to whether or not at the time of the shipment the grape juice in question was fermented.

But upon another branch of the question I am constrained to take the case away from your consideration. This same act of Congress, in another section, affords the defendant in a case of this kind a substantial right. It is provided that the officers of the Department of Agriculture shall make an examination of specimens of food which it is claimed have been either adulterated or misbranded, and after such examination shall have been made, and after an analysis shall have been made, it shall then be the duty of the Department of Agriculture, through its proper officers, to give notice to the alleged violator of the law and afford him an opportunity to be heard. In other words, there shall be a hearing, and the defendant shall be given an opportunity to show that he is not a violator of the law and to demonstrate that a prosecution ought not to be instituted, and that is required to be done prior to the institution of a criminal proceeding. In other words, it is a condition precedent to the institution of such a proceeding as has been instituted in this case. It does not appear in the proofs that any such examination was made, and it does not appear that any hearing was had prior to the institution of this proceeding. It is not alleged in the information in this case, and it is necessary that it should be alleged in the information, and also that it shall be proven in the case. There is no proof of that kind; there is no allegation in this information, and for that reason I am constrained to hold that this is not a case for your consideration. The failure, if there was a failure, to give this defendant an opportunity to be heard and make such explanation as he desired before he should be prosecuted criminally, was a substantial right which ought to have been accorded him, and the Government had no right to institute a proceeding until that hearing had been given. That only applies in a case where the prosecution is instituted at the instigation of the officers of the Department of Agriculture. Had this case been prosecuted in the ordinary way upon an indictment found by a grand jury, and upon an investigation made by the district attorney, or other officers of the Government, except the officers belonging to the Department of Agriculture, such a hearing would not have been necessary, any

more than it would be necessary in any other criminal case. But it is shown by the files in this case, and it is conceded by the district attorney, that this prosecution was instigated by the officers of the Department of Agriculture. Under those circumstances it was necessary that they should give this defendant an opportunity to be heard prior to the institution of these proceedings.

For these reasons, your verdict in this case will have to be, not guilty.

Mr. Clerk, you will take the verdict.

UNITED STATES v. RINCHINI.

(United States District Court, Third Judicial District, Territory of Arizona, October 21, 1911.)

N. J. No. 1450.

Evidence *held* insufficient to justify the court in holding that ice cream should contain 14 per cent of butter fat, and that an article containing less is adulterated.

Indictment charging violation of section 1 of the Food and Drugs Act, consisting in the manufacture and sale in the Territory of Arizona of a quantity of ice cream which was alleged to be adulterated. Demurrer to the indictment on the ground that it did not state facts sufficient to constitute a crime or an offense against the laws of the United States. Demurrer overruled. Jury trial. Verdict of not guilty, by direction of the court.

By the COURT (directing verdict for the defendant) :

[1] A motion has been made in this case to the court to direct the jury to return a verdict for the defendant on the ground that the offense that the defendant is charged with has not been made out by the testimony. The defendant is charged with manufacturing an adulterated article of food, the claim being that a valuable constituent of the article has been in whole or in part abstracted. Now, of course, in the manufacture of ice cream, in the use of milk, as is done, together with some cream, the milk being an article from which the cream has been abstracted, the use of milk in the manufacture of ice cream is the use of an article from which a [2] valuable constituent has been in part abstracted. The question, therefore, to determine in this case is whether or not this defendant in making this ice cream which has been testified to be only 7.09 per cent butter fat, is manufacturing an article from which a valuable constituent has been in part abstracted. Now, the Government, neither by the act of Congress nor by the rules of the Secretary of Agriculture, has established any standard with respect to ice cream: there is no standard established below which a product may not be deemed ice cream and sold as such, and above which it may. There is no fixed standard, as there is in some States, in this act of Congress or in any regulation or rule adopted by the Secretary of Agriculture. Therefore, the question now comes up whether or not the court may, as a matter of law on the evidence now before me, say to you that a certain per cent is proper in the manufacture below which

they may not manufacture, the contention of the Government being that the evidence here is such that the court ought to fix on 14 per cent as the amount of butter fat necessary in ice cream, and that any article manufactured below that is not ice cream, and if, manufactured as such, as the evidence is the defendant has done, he is within the province of the law. Now, I do not feel that the evidence of the custom or use of the trade, before me is such that I can fix upon, as a matter of law, any standard, as is requested by the Government. I am not confident that, under the law, the court would have power to fix a standard in any event, but if the court has power and should fix a standard for the jury then to say whether this falls above or below, I, nevertheless, do not think that the evidence in this case is sufficient to warrant my fixing upon any standard. The evidence is that the general custom of the merchants here of standing, like Mr. Donofrio and Mr. Sanichas, is that any cream below 14 per cent is not proper cream to be called ice cream: there is evidence that in Chicago a large concern there who manufactures ice cream for the best trade, considers that anything below 12 per cent is not ice cream, and is labeled "frozen milk," I believe. There is other testimony in the case that makes it impossible for the court to fix a standard, for, if I fix a standard in this case, we may have some one up at the next term of court indicted for selling ice cream with 12 per cent butter fat if I fixed the standard at 14 per cent, and under that standard the jury would be obliged to convict. I am not sure that 14 per cent is the right amount. It should not be left, it seems to me, for the decision of the court, but that it should be determined by Congress or by authorization of the Secretary of Agriculture so that the trade may know—so that any man manufacturing it will not be at the mercy of what his brother merchants in a town fix upon as being the right proportions. Therefore, in this case I do not think the evidence before me is sufficient for the standard to be fixed either by the court or the jury below which this defendant may be said to have fallen. I grant the motion to direct a verdict for the defendant. One of you may sign it as foreman.

UNITED STATES v. 58 SACKS AND 70 SACKS CORN MEAL.

(District Court, D. South Carolina, October 26, 1911.)

N. J. No. 1342.

Corn meal labeled "Choice water ground plain meal. Hazel Green Mills, Asheville, N. C., * * *" *held* misbranded because it was not ground by the Hazel Green Mills, and because it was not ground by a mill using water power as a motive force applied directly to a water wheel.

Libel under section 10 of the Food and Drugs Act. The Asheville Ice and Coal Co., claimants. Jury trial. Verdict for libelant. Decree of condemnation and forfeiture.

SMITH, *District Judge* (charge to the jury). [2] These are two proceedings brought for the condemnation of certain sacks of meal seized as being misbranded, under the act of Congress. That act of Congress is an act passed in 1906, and is what we call a remedial

act. It is an act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines and liquors, and for regulating traffic therein. Under that act it is prohibited in the case of food to label or brand it so as to deceive or mislead the purchaser in any particular as to the food product which is contained in the package. If the package containing it was labeled with a particular statement, design or device regarding the ingredients or the substance therein, which statement, design, or device shall be false or misleading in any particular, in that case, under the terms of this act, it is misbranded. Now, in the present case the point for you to decide is as to whether or not the device or design or statement contained upon the packages of meal was false or calculated to mislead. In such case they were misbranded, and on that point I charge you as matter of law: First, the question is not as to the quality or the character of the substance contained, or the meal contained in these packages, but it is as to the truthfulness, or the tendency to mislead of the statement printed on it.

As matter of law I charge you that a man when he purchases an article, has a right to buy whatever he pays his money for; it may be a pure fancy on his part, and it may be the veriest whim on his part, but if he stipulates in the contract that he is to buy certain specified articles, or an article prepared in a certain specified way, and that is the contract and the agreement, and he pays for it, then he is entitled to have it, although the result may be that he chooses to buy an inferior article at a higher price, he has the right to have what he pays for. Therefore in this case the question is not as to the character of the substance in here, not any question of moral turpitude, that defendant only furnished an inferior article, that does not come in; the question is as to whether these sacks of meal contained the article that they were stated to contain, or is the statement on them calculated to mislead and deceive the [3] person, i. e. the consumer, in buying the article that he intends to buy. Now, the evidence is that, in the first place, these sacks of meal were labeled "water ground," and I charge you that it is a matter of fact for the jury to determine from the testimony whether these sacks, the meal in them, was water ground or not, and that depends upon the meaning of "water ground," and that is for the jury to find.

The evidence here is that this meal was not ground by a mill as the old water mills were worked, by what is known as the direct application of water power, that is to say by the weight of water either by gravity, or velocity and gravity combined, acting directly upon the operative parts of the mill; that is what is meant by the direct application of water. The testimony is that it was what is called by the converted application of water, that is to say the power of water was first used in the application to a dynamo to generate electricity. When that electricity was generated that was transmitted from the point of generation to the different points of the location of the motors, thereby using those motors to apply power to these mills. The question is for the jury to say whether that was direct application, or whether it was converted or transmitted application of water power, just as you gentlemen may consider whether

steam is a direct application of water power because it is water converted by the application of heat. So when you get steam from water power it is conversely nothing but the result of the vapor of water carried up by the heat of the sun, or the dryness of the atmosphere, recondensed and carried back to the earth in streams; therefore, it is for you to say whether or not this mill was run by the direct application of water from a stream or mill pond, or whether it was run by water in an indirect way. Now, those are matters for the jury; it is for you to say whether this meal was water ground, and in that is involved the question of what is water ground. What is water ground? Is it meal ground by the direct application of water in the recognized method of the application of water power, both by gravity and velocity to a water wheel, or does it include the application of electric power generated originally by water, but used not by direct application of water, but by conversion to a different form of power?

I charge you as a matter of law, as to the meaning of water ground, that it is not a question whether or not the product or the meal might be exactly the same, if the power was applied by steam and electricity to burr stones, moving with the same rate of revolution. Now, it may be that the product of that grinding may be exactly the same. It may be that the product of meal ground between burr stones of the same size, of the same character, and moved at the same rate of revolution as if they were in an old water mill, although the power was secured from electricity, would produce exactly the same product, yet, I charge you as matter of law that if you find that was not water ground, according to the accepted definition of that product, then it is not water ground. It may be a mere fancy or whim, yet, if a man says "I want my meal ground at a mill worked by the direct application of water," and the fellow who sells him that meal says "Well, I tell you this is stuff ground that way," although it might be the same article in effect, yet if it was ground by electricity, it is a misstatement, so it is for the jury to determine whether in this case the term "water ground" meant meal ground according to the old method of direct application of water. If you find that it did mean so, then I charge you, if it meant that, that under this testimony, the testimony being that it was not ground in that way, that you will be authorized to find a verdict against these sacks of meal as misbranded.

Now, gentlemen, on the question of the second charge in this information, that they were misbranded because they had the term "Hazel Green Mills" on [4] them, when it was not ground at the old mill called Hazel Green Mill, it is also for the jury to say whether that term is calculated to mislead. That is a matter for you to decide also. I charge you that if it was ground in any other manner than you find was water ground, and if you find that the putting the meal in sacks was calculated to mislead the individual, the purchaser, who was stipulating for water ground and it was not water ground, then it would be your duty, and you would be justified and authorized to find a verdict against them.

Now, as to the term "Hazel Green Mills"—that depends upon two different matters: Whether that was a brand, or whether it was a designation of the location of manufacture. I charge you that

brands may consist of all sorts of fancy names, and that a person may acquire a brand from manufacturing at one spot and move his factory, and if he produces the same article he is entitled to carry his brand, although he no longer manufactures at that place; that if he manufactured fancy wheat at Greenville or any other point and branded it wheat flour, and originally branded it with some brand referring to the locality and thereafter moved his mill, he had the right to carry his brand, provided two things: That the actual manufacture was not dependent upon something in that locality, and that the name was not calculated to mislead the consumers with regard to that fact. Therefore, if the Asheville Ice and Milling Company purchased the Hazel Green Mills, and the Hazel Green Mills had a brand known as the Hazel Green Flour, and that denoted a particular article which could be reproduced in Asheville by the same method, with the same result, they had the right to remove their brand, and they would not be guilty under this charge for using Hazel Green brand if it simply denominated a brand which had given currency to their flour, and was not misleading because of the character of the production in a certain designated locality; but if you find from the testimony that the name Hazel Green had an acceptance as referred to a method of production at Hazel Green which was not carried on in Asheville—that is to say, if the use of the words “Hazel Green” were calculated and intended to produce the impression that they were water ground at the old Hazel Green Mills, whereas in Asheville they were not ground by the direct application of water, but in another way, then I charge you it would be a misbranding.

It depends upon whether it is simply a brand designating the character or quality, or whether it is a brand which by the name misleads because it contains within it a statement that it must have been done in a particular locality because it would not be the same article if done elsewhere. If you find that that is the case, that the effect of calling it “Hazel Green” was a statement that it was done in a particular locality, and that the same article could not be produced elsewhere, so as to mislead the individual buyer who intended to buy an article produced in a certain way, under a statement that it was done there, then it would be misleading and would be misbranded. In these cases, gentlemen, your verdicts will be framed as follows:

“We find that the meal mentioned within was water ground, and we find that the designation ‘Hazel Green Mills, Asheville, N. C.’ was true.” If you find in favor of the Government then read, “We find that the meal mentioned within was not water ground”; you will insert the word “not.” If you find in favor of the claimant, that it was water ground, within the sense which I charge you, then you will not fill that; and you vary in the same way when you get to the other, because you say “and we find that the designation ‘Hazel Green Mills, Asheville, N. C.’ was true.” Now, if you find in favor of the Government in that last you must put in the word “not”; if you find in [5] favor of the claimant you leave it as it is; date it and sign your name, remembering that the word “not” is to be inserted in both cases if you find in favor of the Government; if you find in favor of the claimant on either one, then you will leave it as it is.

UNITED STATES v. PISO CO.

(District Court, W. D. Pennsylvania, October 26, 1911.)

N. J. No. 1912.

A drug product containing chloroform found misbranded because the quantity or proportion of chloroform present was not declared on the label.

Information charging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty. On motion to set aside the verdict, in arrest of judgment, and for a new trial. Motion granted. Nolle prosequi entered on motion of United States attorney.

ORR, *District Judge* (charge to the jury). [2] The defendant, the Piso Company, stands indicted charged with a violation of what is commonly called the "Pure Food and Drugs Act" of the United States, and it is proper that we should call your attention to some of the provisions of that act. It is very long and we will give you but a brief summary of it.

It provides that it shall be unlawful for any person to ship in original packages in interstate commerce, from one State to another or into a Territory, and it is charged the defendant shipped the product it made into the territory of the District of Columbia—any articles of food or drugs which are adulterated or misbranded within the provisions of this act, and shall be punished for it.

The act provides "That the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this act," and we will come to one of the rules of the Secretary of Agriculture in a few minutes.

The act also provides, among other things, that for the purpose of the act an article shall be deemed to be adulterated, in the case of drugs, "if its strength or purity fall below the professed standard or quality under which it is sold."

The indictment charges the defendant with shipping goods that were adulterated—drugs adulterated. The terms "drugs" includes all medicine, and any "substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease."

The indictment further charges that the shipment of drugs was misbranded. Section 8 of the act provides that the term "misbranded" shall "apply to all drugs, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular." And for the purpose of this act drugs shall be deemed to be misbranded, "If the contents of the package as originally put up shall be removed, in whole or in part, and other contents shall have been placed in such package; or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin," etc., including chloroform, "or any derivative or preparation of any such substance contained therein."

The Government charges, as we have stated, that in the month of October, 1909, the Piso Company, the defendant, shipped into the

District of Columbia certain bottles of medicine which came within the meaning of the word "drugs" as used in this act, and which were adulterated and were misbranded.

[3] There is no evidence in this case from which we should submit to you the question of whether this medicine was adulterated, but there is some evidence to which we shall call your attention as bearing directly upon the question of whether or not it was misbranded.

This act of Congress was passed for the protection of the people. That is plain. It intended that through the instrumentality of the act foods and drugs that should pass in interstate commerce should be as represented, and should be unadulterated and should be branded truthfully.

As we have said, there is nothing in this case with respect to adulteration to be submitted to the jury; but there is a question as to whether or not there has been misbranding. It is eminently proper that when one buys a patent medicine he should know whether it contains injurious substances, whether or not there is anything in it that might hurt or injure him, and it is proper when one buys a drug or a mixture, a patent medicine, or anything which is ordinarily handled with great care, that there should be a statement on the bottle to the effect that that particular article is in the mixture.

This act was originally passed so as to prevent people from taking cocaine when they did not know there was cocaine in the mixture, or chloroform when they did not know there was chloroform in it, or some of the other deleterious substances mentioned in the act.

The act was not limited to that alone. It is broad enough to cover the case where the substance mentioned in the act required to be stated appears in a less quantity than is stated on the bottle. We think this is a fair interpretation of the act; but we want to call your attention to this: That it seems as if it were more important that the maximum amount of an injurious substance should appear on the label than that the minimum amount should be there. That is the construction placed on it by the Secretary of Agriculture and others who adopted the rules in pursuance of the act. We refer to the rules adopted not as controlling this court by way of construing the act, but as being a reasonable construction which the court might adopt if it sees proper, and perhaps as being the construction that is being placed by the rules which are provided for in the act itself.

Regulation 28, paragraph c, provides, that "a drug or food product, except in respect to alcohol, is misbranded in case it fails to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin," etc., including chloroform, "or any derivative or preparation of any such substances contained therein."

Paragraph d, of the same rule, provides that a statement of the maximum quantity or proportion of any such substance will meet the requirements provided the maximum statement does not vary materially from the average quantity or proportion. It seems as if it were a matter of materiality, that the maximum amount should be stated and that if there is a variation from the maximum in the matter of these deleterious drugs, or articles, or substances appearing in the previous section of the rule, it is perhaps of less consequence.

Now take the evidence in this case. Each of these bottles contains on its surface a label. We wish to say to you now that there is nothing in this case for the jury with respect to the matter of whether or not there is a misbranding than the statement on it that it contains 5 minims of chloroform. We have nothing to with any ideas that it might be wrong to sell a patent medicine to people without disclosing its contents generally; we have nothing to do with any question of fraud or deception except as to the question of misbranding in the one particular I have mentioned.

The defendant company stands in this court like any other citizen and is entitled to the fairest and best consideration that the jury can give it in the consideration of the evidence before it. Now, the defendant is presumed to be innocent and the presumption of innocence continues with it until overcome on the part of the Government by evidence beyond a reasonable doubt which satisfies you there was a misbranding in this case. You have to determine whether or not there is evidence on the part of the Government which satisfied you beyond a reasonable doubt that there is a misbranding in the statement that each fluid ounce of this mixture contains 5 minims of chloroform, or a sufficient amount to approach the maximum which is required by the rules of the Secretary of Agriculture. Does this evidence satisfy you? You must take into consideration—we would be neglecting our duty if we did not call to your mind the fact, as it appears in the evidence—that chloroform is exceedingly volatile and escapes when exposed to the air, and it is for you to say whether or not there is sufficient evidence on the part of the Government, in view of the character of the substance searched for by the chemists, and the analyses they made and the methods detailed to you, to satisfy you beyond a reasonable doubt of the defendant's guilt.

Now, comment has been made that there was no chemist employed by the defendant. Gentlemen, it does not take a chemist to make a mixture. It might take a chemist to make a proper compound, but we think any one with a formula can mix the ingredients in a mixture unless there are to be peculiar things done to the different parts before they go into the mixture. It does not require a chemist to make a mixture.

The whole thing resolves itself into this, whether or not there is a false and misleading statement within the meaning of the act of Congress with respect to each fluid ounce in the bottle containing 5 minims of chloroform. It is immaterial in our view of the law whether the defendant did intend a false or misleading statement. We think this is a police regulation, and the person who makes a statement is bound to know whether it is true or not in sending it out to the public; but if they make such a statement on the bottle and that statement is false and the Government has satisfied you it is false and misleading, beyond a reasonable doubt, then you might find the defendant guilty.

If on the other hand you find that the statement was not misleading and false, or if you find the chloroform in the mixture approached the maximum as stated on the bottle—we say to you that the act does not require the exact amount to be stated—then you should find the defendant not guilty.

UNITED STATES v. HEIDE.

(Circuit Court, S. D. New York, November 3, 1911.)

N. J. No. 1335.

An article labeled "Eagle Brand Almond Paste for Macaroons Flavored with Apricot kernels * * *" and containing a quantity of glucose, held not adulterated by reason of the presence of glucose.¹

Information charging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of not guilty.

MARTIN, *District Judge* (charge to the jury). This case stands like any other criminal case—a man is charged with the violation of a statute, a statute of the United States. Now, in order to convict him, find a verdict of guilty, you must find that from evidence that satisfies you beyond a reasonable doubt. [2] Or, in other words, in all criminal cases, so sacred is our liberty and so well is it guarded under the law, that a man comes into court under the presumption of innocence, and that presumption obtains until it is overborne by evidence of guilt, beyond a reasonable doubt.

Now this man is charged with having violated what is called and known as the pure food act. And I simply repeat what I have already said in your hearing to counsel, that it shall be unlawful for any manufacturer to manufacture within any territory of the United States any article of food or drug which is adulterated, or misbranded, within the meaning of this act. And then the word adulterated is defined, as has been read to you by the assistant district attorney, and the charge in this case is that the article which this man shipped—and it is conceded that he did ship it and put it into interstate commerce, so as to bring it within the purview of the law—the charge is, that this article so shipped was adulterated, in that a certain substance other than almond paste, to wit, glucose, had been mixed with said article, so as to reduce and lower and injuriously affect its quality and strength, and had been substituted in part for said article.

Now you must be satisfied beyond a reasonable doubt, in order to convict, that this man did just what he is charged with doing in this complaint. So the question is one for you to determine under this evidence—that is, by the adding of this 5 per cent, if that is what the amount is, of glucose, mixing it as is termed here, did so reduce the product as to lower and injuriously affect its quality and strength. That is the question for you to pass upon. It would not be adulterated unless it had that effect.

Now the cross examination of the defendant, as to not naming glucose, can only be considered as bearing upon the intent because he is not charged with misbranding these goods. There is no claim here that he has falsely represented certain articles and things to be in this that are not there, but what they do say is, that the adding of this glucose has injuriously and materially reduced its value. Now how do you find that fact to be, on the evidence that has come into court here—what these people said about it—what the defendant himself has said about it. That is the question, gentlemen. That is a question, gentlemen, that you want to think of carefully.

¹ But see *United States v. F. B. Washburn & Co.*, N. J. No. 3275.

It has been suggested that it won't drive this man out of business. Well, that may be so. But, a man having a business established, as the evidence shows that this man's business has been established, you should be careful before you pronounce him guilty. See to it that the evidence warrants you doing it, because by that decision you must of necessity affect his business. Take into consideration the whole history of this transaction; what was formerly used, and then withdrawn at the request and suggestion of the party having the pure food act under administration, and the resorting to glucose, and whether glucose deteriorates, injures, is a matter for you to take into consideration, in view of the evidence that has come here upon the stand, and then say whether the adding of that glucose amounted to an adulteration, as charged in the complaint and defined in the statute.

Take the case, gentlemen.

STEINHARDT BROS. & CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit, November 13, 1911.)

191 Fed. 798; Circular No. 57, Office of the Solicitor.

A drug labeled "Damiana Nerve Invigorator" held misbranded because it contained no damiana.¹

Criminal prosecution by the United States against Steinhardt Bros. & Co. for violation of the Food and Drugs Act. From a judgment of conviction defendant brings error. Affirmed.

In Error to the Circuit Court, Southern District of New York.

Before LACOMBE, COXE, and NOYES, circuit judges:

LACOMBE, *Circuit Judge*. There are three counts. The jury brought in a general verdict of guilty. The act complained of was a single one. The counts presented different phases of it. The sentence was for a single offense. Therefore if we find that conviction was properly had on any one count—the third, for instance—the sentence was proper and the judgment should be affirmed.

[799]² We do not understand that it is contended that the third count is in any way defective, either in form or substance. It charges the shipment of a certain food or drink contained in a bottle, the label of which bore a statement or design, regarding the ingredients or substances contained therein, which was false and misleading, in that said label contained the words "Damiana Royal Brand Celebrated Nerve Invigorator," which said words were false and misleading, in that damiana was not one of the ingredients contained in said bottle.

Error is assigned to the refusal of the court to require the prosecution to elect between the second and third counts; the second count charged misbranding of the article shipped, alleging it to be a "Drug." Upon the proof the bottle manifestly contained a "food or drink," unless its contents were shown to be a "drug," as that word is defined in the act. There was conflicting evidence as to whether or not it came within that definition, and that question was

¹ For decision of lower court, see N. J. No. 501.

² Numbers in brackets refer to pages of Federal Reporter.

left to the jury. There was no error in denying the motion to require an election. Misbranding the bottle which contained the liquid was an offense against the act, whether such liquid was a drink or a drug. Election under such circumstances might have defeated the ends of justice.

This misbranding charged under the third count consisted in labeling the bottle "Damiana—Invigorator," when damiana was not one of the ingredients contained in the bottle. It is contended that there was a failure of proof by the Government of the alleged absence of damiana. The Government chemist who analyzed the contents testified that he could not find any trace of damiana in the compound. A man who said he was the person who compounded the liquid testified that it contained a small amount of damiana leaves. The court left it to the jury to say whether in fact there was sufficient damiana in the preparation, so that the label on it, "Damiana," was a proper label, or whether it was not, and whether the label was misleading under the meaning of the act. This part of the charge was not excepted to, but, at defendant's request the court supplemented it with the further instruction that: "The testimony of the experts is not binding upon the jury: that they may disregard such testimony if they choose, and find such conclusion of fact as they choose." Under these circumstances the verdict is conclusive as to the absence of damiana.

The statute contains a section which reads as follows:

Sec. 9. That no dealer shall be prosecuted under the provisions of this act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this act, designating it. Said guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines or other penalties which would attach, in due course, to the dealer under the provision of this act.

Four days before the trial, more than eighteen months after prosecution was initiated, defendant obtained the signature of such a guaranty by another corporation, known as Deimel Bros. & Co. doing a similar [800] business in the same building as defendant. There was some testimony as to business relations between the two corporations, and as to the one holding a controlling interest in the other. The trial judge refused to admit the guaranty in evidence on the express ground that it was dated June 6, 1910; whereas the information was filed November 24, 1909; such refusal is assigned as error. In our opinion his ruling was correct. If Congress had intended that a dealer could avoid conviction by obtaining a guaranty from the manufacturer after his prosecution had begun, it would presumably have evidenced that intention by providing "no dealer shall be *convicted*," instead of providing that "no dealer shall be *prosecuted*." So too the section provides that he is to have the guaranty signed by the person "from whom he purchases the articles," language which seems to imply that guaranty and purchase are related transactions. Moreover, the guaranty is to be of such a sort and so given that the guarantor can be himself convicted of the offense. He surely could be if his guaranty had been signed before the shipment of a misbranded article; the shipment being the offense.

It would seem that he could not be convicted of the offense of shipment when he did not sign guaranty until long after the offense had been committed. We think the statute should be construed according to its natural interpretation.

The judgment is affirmed.

UNITED STATES v. CERTAIN CANS OF SYRUP.

(District Court, E. D. Pennsylvania, November 17, 1911.)

192 Fed. 79.

It is a condition precedent to the maintenance of a libel under section 10 of the Food and Drugs Act, for the condemnation of adulterated or misbranded goods, when the proceeding is based on a report of the Secretary of Agriculture, that such report should be made after an examination and hearing as provided for in section 4 of the act.¹

Libel under section 10 of the Food and Drugs Act. On motion for issuance of process on libel. Motion denied.²

J. B. McPHERSON, *District Judge*. I defer to the decision in *United States v. 20 Cases of Grape Juice* (C. C. A.) 189 Fed. 331,³ but it may perhaps be not improper to add that I feel at liberty to reserve judgment upon the matter referred to in the dictum on page 334.

The Government's motion that process may issue upon this libel is therefore refused.

FRANK ET AL. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit, December 5, 1911.)

192 Fed. 864; N. J. No. 2098.

An article labeled "Perfection Mills Compound White Pepper," composed of 65 per cent white pepper and 35 per cent ground corn product, *held* adulterated and misbranded.⁴

In Error to the District Court of the United States for the Southern District of Ohio.

Jacob Frank, Charles Frank, and Emil Frank were convicted of violation of the Food and Drugs Act, and bring error. Affirmed.

[866]⁵ Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, *Circuit Judge*. The appellants were informed against under the Food and Drugs Act of June 30, 1906 (34 Stat. 768), for shipping in interstate commerce an article of food labeled "Perfec-

¹ But see *United States v. Morgan et al.*, p. 494, *post*.

² The libel in the above case contained the following allegation:

"Your libelant further represents that these proceedings are sought to be instituted as a result of a report to petitioner by the Secretary of Agriculture, under the provisions of section 4 of the act of Congress aforesaid, and that all the matters above set forth are true."

³ P. 413, *ante*.

⁴ For decision of the district court see N. J. No. 835.

⁵ Numbers in brackets refer to pages of Federal Reporter.

tion Mills Compound White Pepper," alleged in separate counts to have been, respectively, misbranded and adulterated. The alleged adulteration consists in the fact that the article contains only about 65 per cent of white pepper, the remaining 35 per cent being a corn product, which is alleged to have been so mixed and packed with the pepper as to reduce and lower its quality and strength. As the corn product was of such a nature as not to constitute adulteration if properly branded, we may, with propriety, confine our attention to the charge of misbranding.

The information charged that the article was labeled and branded as follows: "Perfection Mills Compound White Pepper," in large and plain letters, and about one inch thereunder, the following words, to wit: "Composed of Ground White Pepper and Ground Cereals," in small and inconspicuous type, "so placed upon said label as not to be readily noticed by the purchaser." The information was demurred [867] to as stating no offense under the act in question or under the laws of the United States. The demurrer was overruled. Thereupon a jury was waived by agreement of counsel.

A trial was had before the court upon an agreed state of facts (except in one particular hereafter mentioned), whereby the defendants, pleading not guilty to the charge in the information, admitted the fact of the alleged shipment in interstate commerce, also that the article contained 65 per cent of ground white pepper, and about 35 per cent of ground cereals, and that it was labeled, in large type "Perfection Mills Compound White Pepper," and in smaller type "Composed of Ground White Pepper and Ground Cereals"; also, in substance, the purchase of a sample can by an inspector of the Bureau of Chemistry of the United States Department of Agriculture, its analysis by an analyst of that department, and its possession by the United States district attorney for use on the trial.

The Government admitted on the trial that the words "Composed of Ground White Pepper and Ground Cereals" are in type larger than the size required by Regulation 17c of the rules and regulations passed in conformity with the Food and Drugs Act, and that the article of food contained no added ingredients poisonous or deleterious to health. The package was submitted to the court "so as to display the label thereon" and is returned with the bill of exceptions. The defendants then moved to dismiss the information, and for judgment in their favor, upon the grounds contained in the demurrer to the information. The motion was denied. The trial court held that the label was not in compliance with the law, found the defendants guilty, and imposed a fine of \$50.

Upon the argument in this court, defendants urged that the information was improperly filed, and should be dismissed for that reason, upon the authority of *United States v. 20 Cases of Grape Juice* (C. C. A. 2) 189 Fed. 331, where it was held that in case the district attorney acts solely in pursuance of the report of the Secretary of Agriculture, under sections 4 and 5 of the Food and Drugs Act, the notice and hearing provided by section 4 are conditions precedent to the filing of the information; such notice and hearing not appearing in this case. It would be enough to say that this proposition is not properly before us from the fact that no motion to dismiss for this reason was presented below, nor is the question raised by any plead-

ing or presented by assignment of error. We do not, however, construe the information as showing that it was filed without investigation by the district attorney, or solely by authority of sections 4 and 5 of the act.

The fact that the case was finally heard by the court without a jury raises the question of the effect of the judgment when presented for review. By R. S. Sec. 566 (U. S. Comp. St. 1901, p. 461), the trial of issues of fact in the district court is (with certain exceptions not material here) required to be by jury; and section 649 (page 25), which provides for a waiver of jury in the circuit court, has no application to the district court. The result is that if the offense for which the defendants were tried amounts to a crime, as distinguished from a "petty offense," it could, under section 2 of article 3 of the Constitution of the United States, be tried only by a jury; and, if not so tried, the judgment would be a nullity and require reversal. On the other hand, if the offense is merely a "petty offense," the trial under waiver of jury would amount to an arbitration as to the questions of fact involved; and it would result that the court's conclusions of fact could not be reviewed here, and we would have no power to inquire into the sufficiency of the evidence to support the conviction, nor any question of law arising out of or upon the evidence. *United States v. L. & N. R. R. Co.* (C. C. A. 6), 167 Fed. 306, 93 C. C. A. 58; *Low v. United States* (C. C. A. 6), 169 Fed. 86-88, 94 C. C. A. 1; *Rogers v. United States*, 141 U. S. 548, 12 Sup. Ct. 91, 35 L. Ed. 853.

However, if the submission is upon an agreed state of facts, leaving for determination only a question of law arising thereon, the determination upon that question of law is reviewable. *Henderson's Distilled Spirits*, 14 Wall. 44, 20 L. Ed. 815. Counsel agree that the offense here charged is merely a "petty offense." Construing, as we do, section 2 of the Food and Drugs Act, as providing for no imprisonment for the first offense, but merely for a fine not exceeding \$200, we agree with counsel. *Callan v. Wilson*, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. Ed. 223; *Schick v. United States*, 195 U. S. 65, 24 Sup. Ct. 826, 49 L. Ed. 99.

Was the case finally heard solely upon an agreed state of facts so as to involve only a question of law? We think not. It is true that the case was heard in part upon an "agreed statement of facts," the substance of which has been before set out. But this statement contained no reference to the allegations made in the information that the words "composed of ground white pepper and ground cereals" were "in small and inconspicuous type so placed upon said label as not to be readily noticed by the purchaser," as well as the statement "that the label and branding as above set forth was calculated and intended to deceive and mislead the purchaser thereof." On the other hand, the package containing the pepper was submitted to the court upon the trial, "so as to display the label thereon"; and we are unable to determine from the record that the court did not, in finding the defendants guilty take into account the relative size and prominence of the type of the letters following the first part of the label, in connection with the allegations in the information relating thereto, and draw inferences of fact therefrom. For this reason, we think the final judgment embraced the determination of a question of fact, which is not reviewable here. But the ruling upon demurrer to the

information is still open to review, and its consideration seems to sufficiently present the meritorious question in the case.

Regulation 17e adopted for the enforcement of the Food and Drugs Act, provides that "an article containing more than one food product or active medicinal agent is misbranded if named after a single constituent." Defendants challenge both the validity of this regulation and its application to this case. In the view we take of the case, we have not found it necessary to consider either of these questions.

[869] By section 8 of the act an article of food is declared to be misbranded, "Second. If it be labeled or branded so as to deceive or mislead the purchaser," with the proviso attached to the fourth subdivision of the section that an article not containing any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded, and "Second. In the case of articles labeled, branded, or tagged, so as to plainly indicate that they are compounds, imitations or blends, and the word 'compound,' 'imitation' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale." We assume, for the purposes of this opinion, that if the statement of the ingredients of the "compound" were printed in type as large and prominent as that used in the primary label, and in such position as to be substantially part of one continuous label or brand, there would be no misbranding. But the information alleges the contrary of this, and that the branding "was calculated and intended to deceive and mislead the purchaser." Unless, therefore, the term "compound" on the label naturally implies that the article is a "compound" of white pepper and some ingredient or ingredients other than pepper, it seems clear that there is misbranding. Defendants contend that the term "compound" does naturally so imply; the argument being that as the second subdivision of the fourth paragraph of section 8 of the act provides "that the term 'blend' as used herein shall be construed to mean a mixture of like substances, * * *" and regulation 27a, made under the authority of the act, provides that "the terms 'mixtures' and 'compounds' are interchangeable, and indicate the result of putting together two or more food products," the term "compound" must be held to be a mixture of unlike substances, and that the statute is satisfied in the case of a compound, if the word "compound" is plainly stated on the package. We are disposed to the view that the result of the statute and the regulations thereunder is that a blend is a compound, but a compound may or may not be a blend; in other words, that the term "compound" does not necessarily denote a mixture of unlike substances. The statute does not declare that the mere use of the word "compound," whether as an adjective or as a substantive, sufficiently indicates that the article is a compound within the statute. The provision is that articles containing no poisonous or deleterious ingredients shall not be deemed to be misbranded "in the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds * * * and the word 'compound' * * * is plainly stated on the package."

A primary label "White Pepper Compound" would doubtless fairly indicate that the article is a compound of white pepper and some other ingredient, whether another kind of pepper or an unlike substance, it is not now necessary to decide. But the term "Compound White Pepper" does not, in our opinion, necessarily import

the same idea as "White Pepper Compound." The adjective "compound," we think, is sometimes used colloquially, as meaning "having added strength," as a "compound extract." However this may be, it seems clear that the term "Compound White Pepper" does not so naturally imply, to the average purchaser, a mixture of white pepper [870] with an ingredient other than pepper as to make it a proper branding, as against the fact (as alleged) that the statement of the ingredients is so placed and in such type as not to be readily noticed by the purchaser, and as to be calculated and intended to deceive and mislead the latter. While we have found no controlling authority in specific support of this view, we have found nothing persuasive to the contrary. The decisions principally relied on by the defendants (*In re Wilson* [C. C.] 168 Fed. 566; *United States v. 68 Cases of Syrup* [D. C.] 172 Fed. 781; *United States v. Boeckmann* [C. C.] 176 Fed. 382; *United States v. 779 Cases of Molasses* [C. C. A. 8] 174 Fed. 325, 98, C. C. A. 197), as well as the departmental rulings (one of the most prominent of which is *F. I. D. 63*), are all distinguishable from the case before us. In our opinion, the demurrer to the information was properly overruled.

The motion for new trial was addressed to the discretion of the court, and its denial is not subject to review.

It results from these views that the judgment of the district court should be affirmed.

UNITED STATES *v.* MORGAN *ET AL.*

(United States Supreme Court, December 11, 1911.)

222 U. S. 274; N. J. No. 1692; Circular No. 58, Office of the Solicitor.

It is not a condition precedent to prosecution for violation of the Food and Drugs Act that an investigation be had in the U. S. Department of Agriculture and the defendant afforded an opportunity to be heard, as provided by section 4 of the act.

Error to Circuit Court of the United States for the Southern District of New York. Reversed.¹

STATEMENT OF FACTS.

[275]² The defendants maintained an establishment in New York where, after filtering Croton water drawn from the city pipes, adding mineral salts and charging it with carbonic acid, the water was bottled and sold as "Imperial Spring Water." In October, 1908, a food and drug inspector applied to a druggist in Newark, New Jersey, for several bottles of this water. The druggist, not having them in stock, ordered them from the defendants, who shipped them from New York to the druggist in Newark. He delivered them to the inspector, who paid therefor.

The judge, in his opinion, treats the prosecution as having been instituted by the inspector, though this does not affirmatively appear in the record, and the defendants were not indicted until April, 1910,

¹ Reversing *United States v. Morgan et al.*, p. 300, *ante*.

² Numbers in brackets refer to pages of U. S. Reports.

when they were found guilty of shipping misbranded goods in interstate commerce. They moved in arrest of judgment on the ground that it was not alleged that they had been given notice and a preliminary hearing by the Department of Agriculture, contending this was a condition precedent to the return of a valid indictment. The judge held that such hearing must be granted in all cases where the prosecution was instituted by the Department of Agriculture or its agent (181 Fed. 587), and from a later order sustaining the motion in arrest the Government brought the case here under the criminal appeals act.

[279] Mr. Justice LAMAR, after making the foregoing statement, delivered the opinion of the court.

The Federal courts have not agreed as to the effect of the provision for notice and hearing found in section 4 of the Pure Food and Drug Act of June 30, 1906, 34 Stat. 768, 3915. *United States v. Barrels Olives*, 179 Fed. 983. *United States v. Cases of Grape Juice*, 189 Fed. 331. Whether it confers a right upon the defendant, or results in imposing a duty upon the district attorney, can be determined by a brief examination of a few of the provisions of the act.

Under the pure food law not only a manufacturer, but any dealer, shipping adulterated or misbranded goods in interstate commerce is guilty of a misdemeanor. In aid of enforcement of the statute it is made the duty of the Department of Agriculture to collect specimens of such articles so shipped, and the Bureau of Chemistry is required to analyze them. But, even if the specimen, on analysis, is found to be adulterated, there is no requirement that the case should be turned over at once to the district attorney, for the reason that the "party from whom the sample was obtained" might be a dealer holding a guaranty from his vendor that the articles were not adulterated. In such case the dealer is not liable to prosecution, but the guarantor (sec. 9) is made "amenable to the prosecutions, fines and other penalties.

[280] The act, therefore, declares (sec. 4) that when, on such examination by the Board of Chemistry, the article is found to be adulterated, "notice shall be given to the party from whom the sample was obtained. Any party so notified shall be given an opportunity to be heard." If it then appears that he has violated the statute, the Secretary of Agriculture is required to certify that fact, together with a copy of the analysis, to the proper district attorney, who (sec. 5), *without delay*, must "institute appropriate proceedings," by indictment, or libel for condemnation, or both, as the facts may warrant.

But the act also contemplates (sec. 5), that complaints may be made to the district attorney by State health officials. In that class of cases, no doubt because the State agents investigate without giving a hearing, the district attorney is not obliged to prosecute unless such State officers "shall present satisfactory evidence of such violation." But the very fact that he must do so in that event recognizes that he may begin proceedings against a defendant who has not been given a notice and an opportunity to be heard.

In providing for notice in one case, and permitting prosecutions without it in another, the statute clearly shows that there was no intent to make notice jurisdictional. This view is strengthened by

the fact that it contains no reference to giving notice to anyone except "to the party from whom the sample was obtained." And if, on the hearing given him, it appears that he is a dealer holding a guaranty, the act in providing for proceedings against such guarantor contains no suggestion that a new notice shall be given him before an indictment can be submitted to the grand jury.

In cases like the present, or where foreign goods are labeled as of domestic manufacture and vice versa, no scientific examination may be necessary. But usually a chemical analysis will be required to determine whether an article is adulterated. The Bureau of Chemistry is [281] equipped to do that work, so that in practice most prosecutions will be based on reports made by the Department of Agriculture after notice. But the hearing is not judicial. There is no provision for compelling the presence of the party from whom the sample was received; if he voluntarily attends he is not in jeopardy; an adverse finding is not binding against him; and a decision in his favor is not an acquittal which prevents a subsequent hearing before the department, or a trial in court.

The provision as to the hearing is administrative, creating a condition where the district attorney is compelled to prosecute without delay. When he receives the Secretary's report, he is not to make another and independent examination, but is bound to accept the finding of the department that the goods are adulterated or misbranded, and that the party from whom they had been obtained held no guaranty. But the fact that the statute compels him to act in one case, does not deprive him of the power voluntarily to proceed in that and every other case under his general powers. If, for any reason, the executive department failed to report violations of this law its neglect would leave untouched the duty of the district attorney to prosecute "all delinquents for crimes and offenses cognizable under the authority of the United States." Rev. Stats., sections 771, 1022. So, an improper finding by the department would no more stay the grand jury than an order of discharge by a committing magistrate after an ordinary preliminary trial. For the statute contains no expression indicating an intention to withdraw offenses under this act from the general powers of the grand jury, who are diligently to inquire and true presentment make of all matters called to their attention by the court, or that may come to their knowledge during the then present service.

Repeals by implication are not favored, and there is certainly no presumption that a law passed in the [282] interest of the public health was to hamper district attorneys, curtail the powers of grand juries or make them, with evidence in hand, halt in their investigation and await the action of the department. To graft such an exception upon the criminal law would require a clear and unambiguous expression of the legislative will.

It was argued that the privilege of a preliminary hearing was granted so as to prevent malicious prosecutions. But, had such been its intention, the statute would have required that a hearing should be given to all persons charged with a violation of the act, and not merely to those from whom the sample was received. A further answer is, that as to this and every other offense the Fourth Amendment furnishes the citizen the nearest practicable safeguard against

malicious accusations. He can not be tried on an information unless it is supported by the oath of some one having knowledge of facts showing the existence of probable cause. Nor can an indictment be found until after an examination of witnesses, under oath, by grand jurors—the chosen instruments of the law to protect the citizen against unfounded prosecutions, whether they be instituted by the Government or prompted by private malice. There is nothing in the nature of the offense under the pure food law, or in the language of the statute, which indicates that Congress intended to grant violators of this act a conditional immunity from prosecution, or to confer upon them a privilege not given every other person charged with a crime.

The judgment is reversed.

UNITED STATES v. 75 BARRELS OF VINEGAR.

(District Court, N. D. Iowa, E. D., December 11, 1911.)

192 Fed. 350; N. J. No. 1441.

In a seizure proceeding under section 10 of the Food and Drugs Act, against a food found by the Department of Agriculture to be adulterated or misbranded, it is not a condition precedent to such proceeding that notice be given the claimant and he be afforded an opportunity to be heard pursuant to the provisions of section 4 of the act.¹

Libel under section 10 of the Food and Drugs Act. On exceptions to claimants' answer. Exceptions allowed. Jury trial. Verdict for the libellant.

REED, *District Judge* (on exceptions to libel). In this case the United States have filed a libel of information against seventy-five barrels of vinegar, which it is alleged were shipped from the State of Illinois into the State of Iowa, and held in the latter named State within the jurisdiction of this court by the John T. Hancock Company at Dubuque, Iowa, and were being offered for sale for food consumption by that company in violation of the Food and Drugs Act of Congress approved June 30, 1906, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1187).

Spielmann Brothers Company, a corporation of Illinois, has intervened in said proceedings, and claims to be the owner of said vinegar; admits that it was shipped from Illinois to Dubuque in the State of Iowa, and was being held at Dubuque by said John T. Hancock Company, a corporation; but denies that the same was shipped, or is being held or offered for sale in violation of said act of Congress.

It further alleges that a sample of said vinegar was obtained by the Bureau of Chemistry of the Department of Agriculture, and was analyzed by said bureau, or under its directions, and found, in the opinion of said bureau, or the analyst of said sample, to be adulterated and misbranded within the meaning of said act of Congress: and a report and certificate to that effect made by the Secretary of Agriculture and [351]² forwarded by him to the United States attor-

¹ See *United States v. Morgan et al.*, 222 U. S. 274, p. 494, *ante*.

² Numbers in brackets refer to pages of Federal Reporter.

ney for this district, who, upon such report and certificate alone, instituted this suit under section 10 of said act, as directed by section 5 thereof, for the condemnation and forfeiture of said vinegar.

It is then alleged, in article 6 of its substituted answer or claim as a defense to the proceedings, that the Secretary of Agriculture failed to give notice to the person from whom the sample of said vinegar was procured, or to this claimant, or to any other person, that such sample of vinegar had been analyzed by the Bureau of Chemistry, or under its direction, and found to be adulterated or misbranded, and an opportunity given to them to be heard upon the question of adulteration or misbranding of said vinegar, before this proceeding was commenced, and prays that the suit be dismissed and said property restored to the claimant.

To so much of the allegations of the claimant corporation, as allege the failure of the Secretary of Agriculture to give the notice required by section 4 of said act, and afford to it, or to the person from whom said sample was obtained, an opportunity to be heard before the Department of Agriculture prior to the commencement of this proceeding, the Government excepts for the reason that the same constitutes no defense to this proceeding.

It is contended in behalf of the claimant company that, when a proceeding of this character is instituted by the United States attorney, solely upon the report and certificate of the Secretary of Agriculture to him of a violation of said act, and not upon his own initiative, or upon information furnished to him by the local authorities, such proceedings cannot be sustained unless the Secretary of Agriculture has prior to the commencement of such proceedings, in fact given the notice and afforded to the person from whom the sample was obtained an opportunity to be heard, as provided in section 4 of said act; and the case of the United States *v.* 20 Cases of Grape Juice, Flickinger & Co. claimants, 189 Fed. 331, decided May 8, 1911, by the Circuit Court of Appeals of the Second Circuit, is cited in support of such contention. That case supports the contention of the claimant, upon the ground, as it would seem, that it is the practice of the Government to make an investigation through the proper executive department of alleged violations of the laws of the United States, before commencing criminal proceedings against the alleged offender, or proceedings for the forfeiture of property shipped, or offered for sale in violation of law. Admitting that such is the practice of the Government, it cannot be that it is the right of an alleged offender to have such investigation made before he can be indicted for an alleged offense, or proceedings commenced against him, or the property which has been shipped or offered for sale in violation of law, for its condemnation and forfeiture, or that he can plead the failure to make such investigation as a defense to an indictment, or other proceedings for the condemnation of the property so illegally used.

Section 4 of the Food and Drugs Act reads in this way:

That the examinations of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of such bureau, for the purpose of determining from [352] such examinations whether such articles are adulterated or misbranded within the meaning of this act; and if it shall appear from any such examination that any of such specimens is adulterated or misbranded within the meaning of this act, the Secretary of Agriculture shall cause notice thereof to be given to the party

from whom such sample was obtained. Any party so notified shall be given an opportunity to be heard under such rules and regulations as may be prescribed as aforesaid, and if it appears that any of the provisions of this act have been violated by such party, then the Secretary of Agriculture shall at once certify the facts to the proper United States district attorney, with a copy of the result of the analysis or the examination of such articles duly authenticated by the analyst or officer making such examination, under the authority of such officer. After judgment of the court, notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid.

Section 5 is as follows:

That it shall be the duty of each district attorney to whom the Secretary of Agriculture shall report any violation of this act, or to whom any health or food or drug officer or agent of any State, Territory, or the District of Columbia shall present satisfactory evidence of any such violation, to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the penalties as in such case herein provided.

This proceeding is under section 10 of the act, which need not be set out.

In the case above cited it is conceded that the failure of the Secretary of Agriculture to give the notice and afford the opportunity to be heard, as required by section 4 of the act, does not limit the authority of the United States attorney to commence proceedings upon his own initiative and prosecute the same to final determination; but it is held that said section imposes upon the Secretary of Agriculture the duty of making an investigation of the facts before he may rightly make a report and certificate to the United States attorney for the proper district, of a violation of the act, and before proceedings instituted without such notice and opportunity to be heard can be sustained. It seems to me that section 5 of the act imposes upon the United States attorney of the proper district, the duty of instituting the appropriate proceedings whenever he is informed by the local authorities, or by the report and certificate of the Secretary of Agriculture, that the law has been violated, to commence without delay the appropriate proceedings for the alleged violation of this act. And whenever such information, or report is made to him he has no discretion but to proceed as directed by that section; and he is not required to investigate and determine whether or not the Secretary of Agriculture has performed his duty under the law.

Just what may be the purpose of the requirements of section 4, that the Secretary of Agriculture shall give the notice and opportunity to be heard, may not be entirely clear. It will be observed that this section only requires the notice to be given to the person from whom the sample is obtained, who may be only the bailee of the property of which it is a sample, and knows nothing of its ingredients, and afford him an opportunity to be heard. This may be for the purpose of ascertaining who is the real violator of the law, if the analysis shows such violation, with a view of affording him an opportunity to discontinue its violation and proceed lawfully in the conduct of his [353] business under the act and the requirements of the Department of Agriculture. However this may be, it does not seem to me that the giving of, or the failure to give, such notice and opportunity to be heard can relieve any violator of the law of the penalties which he may have incurred by reason of its violation, or that the Government is barred from prosecuting him by indictment or commencing

proper proceedings for the condemnation and forfeiture of the property illegally manufactured and shipped, or offered for sale. This is the view taken by several of the district courts, viz, Judge Morris in *United States v. 50 Barrels of Whisky*, 165 Fed. 966; Judge Dayton in *United States v. 65 Casks of Liquid Extracts*, 170 Fed. 449, 454; Judge McPherson in *United States v. Nine Barrels of Olives*, 179 Fed. 983; and Judge Willard in *United States v. 100 Barrels of Vinegar*, 188 Fed. 471. With the utmost respect for the opinions of the Court of Appeals of the Second Circuit, I am unable to agree with its conclusion in the case cited.

The notice that is required to be given of the seizure of the property and of the proceedings for its condemnation affords ample opportunity to its owner to appear and defend against such proceedings; and if upon the final hearing it is condemned and declared forfeited, he is not deprived of his property without due process of law.

The exceptions of the Government to that part of the answer of the claimant above referred to are allowed and an order will be entered accordingly.

VON BREMEN ET AL. V. UNITED STATES.

(Circuit Court of Appeals, Second Circuit, January 8, 1912.)

192 Fed. 904; N. J. No. 1949.

Evidence held insufficient to warrant a finding that sesame oil, labeled "Imported Salad Oil Morel Brand" was misbranded.

In Error to the Circuit Court of the United States for the Southern District of New York.

Henry Von Bremen and others, doing business as Von Bremen, MacMonnies & Co., were convicted of violating the Food and Drugs Act, and bring error. Reversed.¹

[905]² Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, *Circuit Judge*. This is an information under the Food and Drugs Act of June 30, 1906, against the defendants, who compose the firm of Von Bremen, MacMonnies & Company, containing two counts. The first count charges them with delivering for shipment from New York to Galveston a can bearing the label, "Imported Salad Oil Morel Brand," which was a misbrand because it was false and misleading, in that it indicated that the contents of the can was olive oil, whereas it was sesame oil. The second count charges that the same can was misbranded, in that it was labeled or branded so as to deceive and mislead the purchaser into believing that it contained olive oil, whereas it contained sesame oil.

The first count falls within the first subdivision of section 8 of the act as to foods, viz, that the article "was offered for sale under the distinctive name of another article," namely, olive oil. The second count falls within the second subdivision, viz, that the article was "labeled or branded so as to deceive and mislead the purchaser," namely, by making him think he was getting olive oil, whereas he was getting sesame oil.

¹ Reversing *United States v. Von Bremen et al.*, p. 347, *ante*.

² Numbers in brackets refer to pages of Federal Reporter.

The trial judge, taking judicial notice that standard lexicographers define the words "salad oil" as "olive oil," denied the defendants' motion to quash the information on the ground that it alleged no offense, and afterwards, it being stipulated that the can contained sesame oil and not olive oil, he denied the defendants' motion to direct a verdict in their favor. These rulings were within our decision in the *Brina* case, 179 Fed. 373, 105 C. C. A. 558. The Government thereupon rested, and the defendants showed by a large number of witnesses that for some forty years a perfectly healthy oil for edible purposes had been made from cotton seed and sold in enormous quantities in this country as "salad oil" and that other edible oils were made from the seed of sesame, a kind of grass, and from peanuts and from corn and sold as salad oil. The oil in question is sesame oil imported by the defendants. The defendants also showed that olive oil is always, except perhaps in the case of one brand, labeled and sold as olive oil; that it is four times as expensive as the oils sold as salad oils and that these other oils are sold in vastly greater quantities, the American Cotton Seed Oil Company selling from 175,000 to 200,000 barrels, the Union Cotton Seed Oil Company 40,000 barrels a year of salad oil made from cotton seed.

In reply to this the Government called two purchasers of oil, Edward Nougaret, steward of the *Cafe Martin* (in this country a month), who testified that nothing but olive oil was used there. Francis J. Englefield, purchasing agent of the *Hotel Knickerbocker*, [906] testified that nothing but olive oil is used there, and that "salad" means the very best kind of olive oil. It also called three sellers of olive oil; John W. Eginton, an employee of James P. Smith & Co., who sell nothing but olive oil, testified that in his opinion "salad oil" means olive oil; Benito Maspero, an importer of Italian olive oil, who said that in his line of business "salad oil" is generally claimed to be olive oil; Henry L. Marks, chief clerk of an importer of olive oil, testified that in the trade they supply "salad oil" means olive oil. They all said their oil was labeled olive oil.

The act does not make the intention of the defendants material; but, as the case was a criminal one, the jury was bound to be convinced beyond a reasonable doubt that the article in question was misbranded before they could find the defendants guilty. We think that the proof did not justify such a conclusion, and that the defendants' motion for the direction of a verdict in their favor should have been granted.

Assuming, however, that there was enough to send the case to the jury, other errors were committed. We think it was error upon the state of facts set forth above to refuse to let the dealers in salad oil not made of olives say whether they had ever heard any complaints from purchasers to the effect that they had been misled or deceived. Such testimony would be directly relevant to the charge in the second count that the article was branded so as to deceive or mislead purchasers.

It was also error to refuse to let large dealers in this salad oil say what the understanding of the trade was as to the meaning of the words "salad oil." It would certainly be relevant to the inquiry under the first count that the article was branded under the distinctive name of olive oil to show what the trade which buys and sells

thousands of barrels of this "salad oil" a year understands by those words, and it was also relevant to the inquiry under the second count because it is a fair inference that the trade does not sell salad oil to the consumer as anything else than what it really is.

So we think it was error to permit the Government to cross-examine the defendants' witnesses as to whether they thought the words "salad oil" would be less misleading if the words "pressed from cotton seed" on some of the labels were in larger type or if the cans had been labeled simply "cotton seed oil." The question to be decided was whether purchasers supposed they were getting olive oil when they purchased "salad oil," and it throws no light on this to inquire whether they could have been in any doubt if the words "cotton seed oil" alone were used or if the words "cotton seed oil" were printed in large type on the label. We think the case was tried throughout a little too strictly against the defendants. The judgment is reversed.

LACOMBE, *Circuit Judge*. I concur in the conclusion to reverse, because I think some testimony was excluded which defendant was entitled to have in the case. But I am of the opinion that there was [907] a question for the jury to pass upon and that that question was whether the article was labeled so as to deceive or mislead "the purchaser," who, in the case of a sale at retail, would be one of the general public not necessarily informed as to the trade meaning of words.

UNITED STATES v. 75 BOXES OF ALLEGED PEPPER.

(District Court, D. New Jersey, January 25, 1912.)

198 Fed. 934; N. J. No. 1568.

An article composed of ground black pepper and ground long pepper, and labeled "Pure Pepper," held misbranded.

Libel under section 10 of the Food and Drugs Act. Libel sustained. Decree of condemnation and forfeiture.

CROSS, *District Judge*. No jury having been demanded, the above entitled cause came to hearing before the court. On or about June 28, 1911, B. Fischer & Company, the claimants herein, of the City of New York, shipped in interstate commerce from that city to Jersey City, in the State of New Jersey, seventy-five boxes containing the alleged pepper which the Government seeks to condemn as having been misbranded and adulterated within the meaning of the act commonly known as the Pure Food and Drugs Act of June 30, 1906 (34 Stat. 768). The Government claims that the article contained in the boxes consisted of a combination of ground *Piper nigrum* (or black pepper), and ground *Piper longum* (or long pepper). The product was labeled by the claimants "pure pepper," and bore its guaranty number 6657 at the time of its shipment.

At the close of the proofs the case was reserved, and counsel [935]¹ requested to submit briefs upon the following points deemed to be involved in the disposition of the case:

First. Was a notice and hearing as provided for by section 4 of the act, a condition precedent to the bringing of this suit?

¹ Numbers in brackets refer to pages of Federal Reporter.

Second. Shall the words "pure pepper," as affixed to and used as a label upon the boxes in question, be given their ordinary and customary meaning or a technical meaning?

Third. Are the words "pure pepper," as so used, in any wise false or misleading under the evidence in the case?

It is probable that the first question would have been the most difficult of solution, owing to the conflicting decisions of subordinate courts, but for the fact that since the hearing and on December 11, 1911, the Supreme Court, in the case of the *United States v. John Morgan and Alfred Y. Morgan*, 222 U. S. 274, 32 Sup. Ct. 81, 56 L. Ed. 198, held that the notice and hearing referred to in the first point were not a condition precedent to the bringing of a suit of this character.

The second point reserved must be answered in the affirmative. It is difficult to perceive how otherwise justice could be done in any given case, or what practical efficiency the statute would have or what protection it would afford if the public were required to have scientific and technical knowledge as to the derivation and nomenclature of the various food and drug products. The ordinary purchaser, unless he could rely upon the common and generally understood signification of a label, could never be certain of what he was buying. A label should be reliable to the extent that it will not in any wise, or to any extent, mislead such a purchaser. In the case of *Brina v. United States*, 179 Fed. 373, 105 C. C. A. 558, the Circuit Court of Appeals of the Second Circuit, speaking by Judge Lacombe, said:

The section declared on (section 2) imposes a penalty on any person who shall ship or deliver for shipment from any State, to any other State, any article of food or drug so misbranded. It was proved that the words "Olio per Insalata" mean "oil of salad" or "salad oil," and the trial judge held and so charged the jury, that "as a notorious fact salad oil *prima facie* means olive oil" but allowed the defendant to show if he could that "it means something else because of recent events which have perhaps rendered olive oil more difficult to obtain, or that other food elements have come to be known as salad oil." No such proof was introduced, and the ruling is assigned as error. The *Century Dictionary*, *Worcester's*, *Stormont's Imperial*, and the *Encyclopedia* all define "salad oil" as "olive oil." Webster's does not give any definition. We are satisfied that the trial judge quite properly charged, in the absence of any testimony of the sort suggested, that "salad oil" *prima facie* imports olive oil; that is what the world has been accustomed to regard salad oil.

So also in *Worden v. California Fig Syrup Co.*, 187 U. S. 516, 536, 23 Sup. Ct. 161, 167 (47 L. Ed. 282), which was a trade-mark case, the court speaking of a label containing the words "Syrup of Figs," and what should be understood from those words as used, said:

The argument for complainant is that, because fig juice or syrup has no laxative property, everybody ought to understand that, when the term is [936] used to designate a laxative medicine it must have only a fanciful meaning. But the fact is admitted that the public believe that fig juice or syrup has laxative medicinal properties. It is to them that the complainant seeks to sell its preparations, and it is with respect to their knowledge and impression that the character, whether descriptive or fanciful, of the term used, is to be determined.

The extract given from the case last cited was quoted from an opinion by Judge Taft in *California Fig & Syrup Co. v. Frederick Stearns & Co.*, 73 Fed. 812, 817, 20 C. C. A. 22, 33 L. R. A. 56 (C. C. A. Sixth Circuit). Counsel for the Government has also cited several cases which have arisen from time to time in different district courts

of the United States, and has furnished extracts thereof from circulars issued by the Department of Agriculture; but, as such extracts were parts of charges to juries and the cases do not appear to have been reported, no further mention will be made of them, except to say that they all follow the above doctrine.

The third question reserved requires an examination of the facts of the case. It has already been stated, and it is not disputed, that the article in question was labeled by the claimants "pure pepper," and that it was composed of *Piper nigrum* and *Piper longum*, or black pepper and long pepper, ground and mixed. The evidence also shows that the mixture contained a larger proportion of long pepper than it did of black pepper, or, to be more definite, that it contained between fifty and seventy-five per cent of long pepper, worth at the time of the shipment in question several cents a pound less than black pepper, and that such differences in price usually, but not invariably, existed. The two kinds of pepper, black and long, belong to the same genus, but differ in strength, quality, and characteristics. The testimony shows that black pepper or *Piper nigrum* is known in the market as "ordinary pepper," "common pepper" and as what people usually term "black pepper," and that "pure pepper" means in the trade *Piper nigrum*, and nothing else. The weight of the testimony upon these points and particularly upon the point that "pure pepper" means in the trade nothing else than *Piper nigrum*, is overwhelming; while of the evidence in general it may fairly be said that it is but slightly conflicting. The defendants have introduced evidence to show that there are four kinds of pepper in common use, "black pepper," "white pepper," "long pepper," and "red pepper," the first three of which are grouped in one family, known as the capsicum family. It appears, however, that white pepper is *Piper nigrum* whitened by means of a process, and as red pepper is in no wise under consideration, it is only requisite to consider black pepper and long pepper. The defendants claim that because these two varieties of pepper belong to the pepper family and are so classified in some, but not in all, scientific books, they were justified in labeling a mixture of them "pure pepper," and that such labeling was neither false or misleading in any particular. But, as above stated, the evidence is clear that "pure pepper" is known to the trade and in the market as black pepper and nothing else. It also appears that the two [937] kinds of pepper, black and long, have different qualities, characteristics, and uses. If the defendant's contentions were upheld, they could with impunity sell an article composed entirely of the cheaper and inferior long pepper for "pure pepper" or black pepper, although the purchaser would pay the price of, and be justified in believing that he was buying, black pepper. Speaking generally, "flour" is a generic name. Suppose, however, that wheat flour was generally known in the trade as "pure flour," would a manufacturer be justified under the act in so labeling it, if as a matter of fact it were composed of a mixture of fifty per cent of wheat flour and fifty per cent of rye or buckwheat flour? Numerous illustrations of a like character are instantly suggested.

But the defendants, furthermore, attempt to justify their conduct in the premises because of its alleged conformity with a pamphlet

published and circulated by the United States Department of Agriculture, called "Standards of Purity for Food Products," as established and prescribed by that department. But I can find in those standards no warrant for such justification. Substantially all they do is to classify under the title "pepper" *Piper nigrum*, *Piper longum*, and white pepper, and describe them. Notwithstanding such classification, it would seem that both the public and the department might reasonably assume that, if black pepper and long pepper were mixed or blended, in equal parts, the product would be marked or branded as required by the act in question.

The more pertinent parts of that act are as follows:

Sec. 8. That the term "misbranded" as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device, regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

That for the purposes of this act an article shall also be deemed to be misbranded:

In the case of food:

* * * Fourth: If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design or device shall be false or misleading in any particular: *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredient shall not be deemed to be adulterated or misbranded in the following cases:

First: In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

Second: In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word "compound," "imitation," or "blend," as the case may be, is plainly stated on the package in which it is offered for sale: *Provided*, That the term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only: *And provided further*, That nothing in this act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredients [938] to disclose their trade formulas, except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding.

It seems to me that the fourth subdivision of section 8, in connection with the second paragraph of such subdivision, covers this case as completely as if specially enacted therefor, and that a mixture of black pepper and long pepper constituted a compound "blend" within the meaning of the act, and should have been so marked. In view of this conclusion, it is unnecessary to consider whether the article in question was also adulterated as claimed by the libellant.

Upon consideration of all evidence in the case, it is concluded that the "seventy-five boxes of alleged pepper" bore a false and misleading label, and were consequently misbranded within the meaning of the Pure Food and Drug Act.

Judgment of forfeiture will accordingly be entered in favor of the United States, with costs.

HUDSON MFG. CO. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit, February 6, 1912.)

192 Fed. 920; N. J. No. 1451.

An imitation vanilla extract labeled "Hudson's Extract," without giving any indication of what the article was composed, *held* misbranded.

In Error to the District Court of the United States for the Eastern District of Louisiana.

This was a libel proceeding instituted by the United States under section 10 of the Food and Drugs Act, for the condemnation and forfeiture of a food product labeled "Hudson's Extract, made by the Hudson Mfg. Co., Chicago, Ill.," which was alleged to be adulterated and misbranded. Adulteration was alleged in that there had been mixed and packed with it, so as to reduce, lower, and injuriously affect its quality and strength, commercial vanillin and coumarin; and in that said commercial vanillin and coumarin had been substituted in whole or in part for the genuine vanilla extract; and in that said extract had been mixed and colored in a manner whereby damage and inferiority were concealed. Misbranding was alleged in that said article was offered for sale as vanilla extract, whereas in truth and in fact it was not genuine vanilla extract but was an imitation thereof and was offered for sale under the distinctive name of another article, to wit, vanilla extract. The Hudson Mfg. Co. intervened as claimants and filed exceptions and demurrer to the libel, which exceptions and demurrer were overruled by the court. To the claimants' answer the libelant filed exceptions, which exceptions were sustained by the court, and the claimants filed an amended answer. The case was tried to a jury, which returned a verdict for the libelant. Whereupon the claimant moved for a new trial. This motion was denied.

The claimant excepted to the order of the court refusing its motion for a new trial, filed its bill of exceptions, and sued out a writ of error. The case was heard by the Circuit Court of Appeals for the Fifth Circuit, and decree of the lower court affirmed.

[921]¹ Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

By the COURT:

Where there is no proof that the words "Hudson's Extract" have a well-known trade meaning, an imitation of vanilla marked "Hudson's Extract," without giving any indication of what the article is composed, shows a clear case of misbranding under the pure food law.

The judgment of the district court is affirmed.

WILLIAM HENNING & CO. v. UNITED STATES:

(Circuit Court of Appeals, Fifth Circuit, February 6, 1912.)

193 Fed. 52; N. J. No. 1529.

Tomato catsup to which pumpkin was added as a filler, and which was labeled "Compound Catsup," without anything on the labels under which it was sold to show the substances composing the compound, *held* adulterated and misbranded.

In Error to the District Court of the United States for the Eastern District of Louisiana.

¹ Numbers in brackets refer to pages of Federal Reporter.

Libel proceedings under section 10 of the Food and Drugs Act for the condemnation and forfeiture of a quantity of adulterated tomato catsup, William Henning and Company claimants. From a judgment of condemnation claimants bring error. Affirmed.

FARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge:

By the COURT:

Conceding in this case that the addition of pumpkin to tomato catsup as a filler results in an article that may be described as a compound, still the Food and Drugs Act requires that such article must be labeled, branded, or tagged so as to plainly indicate the substances composing the compound, and it is not a compliance with the act to merely mark the word "Compound" on the package.

The judgment of the district court is affirmed.

UNITED STATES v. 443 CANS OF FROZEN EGG PRODUCT.

(Circuit Court of Appeals, Third Circuit, Feb. 20, 1912.)

103 Fed. 589; N. J. No. 1576.

Evidence held to require a finding that certain cans of frozen egg product, the subject of interstate commerce, contained decomposed or putrid animal substance within the meaning of the Food and Drugs Act, section 7, and were therefore adulterated and subject to forfeiture.

Appeal from District Court of the United States for the District of New Jersey.

Libel under section 10 of the Food and Drugs Act. Judgment for claimant, and plaintiff appeals. Reversed, with directions.¹

[590]² Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

BUFFINGTON, *Circuit Judge*. In the court below, the United States, proceeding under the act of Congress of June 30, 1906 (U. S. Comp. St. Supp. 1909, pp. 1187-1190), filed a libel for the condemnation of four hundred and forty-three cans of frozen egg product. So far as now pertinent, the libel charged that such product was intended for food, was decomposed, and that it was adulterated, in the statutory definition of adulteration. After seizure, the product was claimed by the company that made it and the proceeding defended. The claimant's answer admitted interstate shipment of the product and other jurisdictional facts as to three hundred and forty-two cans, that ten per cent of the product was superadded sugar, but denied it was decomposed or adulterated. The case turns on two questions: first, that of fact, whether the product was decomposed; and second, that of law, whether the product is adulterated as adulteration is defined by the Federal food law above referred to.

This product came from a company in Kansas which markets eggs in the shell and also in this frozen form. It was consigned to a baking company in New York City, and was seized in New Jersey. The product was prepared under a patent, referred to below, and for convenience we refer to it hereafter as frozen eggs, the seized cans bear-

¹ Reversing United States v. 443 Cans of Frozen Egg Product, p. 351, *ante*. Circuit Court of Appeals reversed by Supreme Court, p. 582, *post*.

² Numbers in brackets refer to pages of Federal Reporter.

ing the label: “* * * Eggs for Cooking. Slow Thawing Gives Best Results.” Without entering into details, we may say the company selected from the current supply which came from stores and dealers, the highest grade of eggs, which it marketed in the shell. The remainder, termed “discards,” were sorted by candling into three grades, namely, “seconds,” “checks,” and “spots,” or, to quote from complainant’s testimony: “A current use egg is an egg that is full firm; it may be clean and some slightly soiled shell eggs. Number two is a dirty shelled egg, a small egg, though [591] it may be dirty shelled or clean shelled, and the check egg is an egg that is cracked in course of transportation.” Of the discards, the seconds and checks are used for food purposes in the frozen product here in question, while the spots, or third class, which consist of leakers, or eggs with broken shells, blood ringers, and embryo chicks is used in liquid form for tanning purposes. “Candling” consists of examining the egg as it is held before an artificial light in a darkened room. As this sorting by candling is done with great rapidity—an expert girl sorting and breaking from seven to eleven thousand eggs in a day—there is a likelihood of bad eggs going into the mixture, for as the claimant’s president, speaking of bad eggs, admits, “There is likely an egg (bad) that goes in once in a while through the candling process.” In addition to the spoiled eggs, there is danger from musty eggs, the deleterious effects of which are such that, as stated by one of claimant’s witnesses, “One musty egg would spoil anywhere from two hundred and fifty to three hundred and fifty eggs.” And a musty egg cannot be detected by candling, and must be opened slowly to emit smell, the proof of claimant being, “The only way you can detect a musty egg is by smelling it; if a person opens a musty egg quick, it is very hard to detect it. You must open them slowly. You can smell them if you are not too quick opening them. If you take your time in opening the egg, you can smell if it is musty or fresh.” It is clear therefore, that the danger from contamination, both from bad and musty eggs, is very considerable in the rapid sorting at claimant’s factory. After the eggs were thus sorted and broken, they were run through a colander to break the yolks, chilled, thoroughly mixed by churning, passed through a fine meshed sieve, and finally mixed with sugar and frozen solid. This sugar, to the extent of ten per cent, was added in pursuance of the patented process “to prevent the permanent thickening of the egg mixture containing the yolk of the egg when subjected to low temperatures, so that the physical characteristics of fresh eggs will be preserved and a deterioration of the egg both as to flavor and otherwise be preserved.” But, in this connection, it will be noticed, as hereafter stated, that, when the frozen product is melted, the sugar tends to hasten decomposition. The patent covered both a process and a new article of manufacture, viz: “As a new article of manufacture egg containing added sugar and frozen below the temperature of decomposition.” etc.

The voluminous testimony consisted of two kinds, fact and expert, and has all had our full consideration. As to the facts, when the testimony is carefully analyzed, there is little dispute, but the scientific deductions from such facts are as far apart as is usually the case where experts testify. After the seizure in Jersey City of the cans containing the product, samples were taken by the scientific represen-

tatives of both sides. The Government experts made analyses and tests of their samples. Whether the claimant's experts made corresponding analyses and tests of theirs does not appear in the proofs. They did, however, make certain tests in the court below. Turning to the cooking and smelling tests to which the Government [592] samples were submitted, the proofs disclose the following facts: Benjamin R. Jacobs, qualified as a chemist, a graduate of scientific schools, of experience in testing bakers' products for manufacturing companies, and is now, and for four years has been, employed as a chemist in the Government Bureau of Chemistry, where he carried on cooking experiments for that bureau. He used three different samples of the frozen eggs, which he received from Dr. Bacon, whose custody and prior treatment of which we will refer to later. At the same time he took fresh eggs, and used them and the frozen eggs in cake making in the same manner. After describing his mixtures and preliminary work, the witness, to reduce the questions and answers to narrative form, in substance said: this dough was placed into small gem cups—so-called cake cups—and baked for twenty-five minutes. The finished product of this blank or fresh eggs was taken as a standard to judge the odor, both hot and cold, the color and appearance of all the eggs. The fresh eggs had the normal odor of a fresh egg, and the sample number 11,158 C, while it was being beaten, had a very strong odor of rotten eggs, sample 11,167 C had rather a strong odor of rotten eggs, and sample 11,173 had a very strong odor of rotten eggs while being beaten. The odor permeated his and the adjoining rooms, and people in the next one called attention to it. All the samples had a strong odor of rotten eggs while hot, and a normal odor when cold. When the cakes baked from these samples were cold, there was nothing in their color or smell different from the cakes he baked from fresh eggs at the same time. The odor was only detected when the cakes came from the oven and were broken. Dr. Bacon, also a chemist of the bureau, who had had very considerable experience in the chemistry and decomposition of foods, testified to observing Dr. Jacob's cooking experiments; that he handled the frozen eggs and they were odorless; but, when Jacobs baked the cakes, they had when broken open hot the foul odor of decomposed albuminous matter. He further says he distilled both fresh and frozen eggs at the same time by the same process. In the distillate of the former he simply found the ordinary odor of fresh-boiled eggs, while in the latter his distillate was very foul, had a fishy odor, very pronounced, the odor of decomposing fish. This odor not only permeated the witnesses's room, but got out into the hall to such an extent that occupants of other rooms came and complained. Dr. Rosenberger, who received several of these samples for analysis, among them 11,158 C, 11,167 C, and 11,173, is professor of hygiene and bacteriology of the Jefferson Medical College, Philadelphia, and for three years has examined eggs and egg products for the Pennsylvania State Food Department. Speaking of No. 11,158 C, he says it smelled like stale fish, a stale fishy odor, and from his observation and experience with such matters he would say it was decomposed. Dr. Stiles, who is in charge of the bacteriological work of the Bureau of Chemistry, made bacteriological tests of the frozen eggs. He said that, when the claimant's eggs were frozen, [593] they had no appreciable odor, but as

melting went on the odor came. He then said: "By taking one of the Mason jars and vigorously shaking it, and then removing the cover—I did that after removing our bacteriological samples—I could detect, plainly detect, an odor. This odor increased as the product stood, and in our sample I observed during the day that it was kept at approximately a temperature of twenty-two degrees centigrade, at the end of two hours there was a distinct odor, which increased on the standing of the egg. It was a sweetish, rancid, fishy odor."

Unless in some way counteracted, this testimony would seem conclusive of the fact that this product was decomposed. This it is sought to do on several grounds: First, that other samples taken from the same cans were tasted, smelled, and cooked by the claimant's witnesses, without any odors or other evidence of the decomposition being discovered. But this testimony, while it is persuasive as to the particular samples used by claimant's witnesses, is at best but negative and does not disprove the positive and affirmative evidence as to the foulness of the samples used by the Government witnesses. Moreover, it is to be borne in mind that no analysis was made by the claimant of the samples taken by its experts at the same time and from the same packages the Government's samples were taken. To us it is clear that testimony of the limited, negative character referred to above cannot avail to counteract and discredit the strong, positive proofs of decomposition found in the testimony of those who testified thereto. And in weighing testimony founded on the senses, and this is particularly true of the sense of smell, it is a fact that there is a wide difference in individuals in the sensitiveness of the olfactory nerves. Two men may truthfully testify as to the acute presence or the absence of odor, but with such testimony before it, that of the man who detected the odor should have the greater weight. One is positive, the other negative. It is also contended that the samples of the Government were not subjected to proper treatment, and by reason of delay in treatment they were unfairly allowed to deteriorate before the tests were made. It must be borne in mind that the question we have before us is whether this product, when subjected to the conditions ordinarily incident to its use as a food product, was decomposed. The test is not whether decomposition existed and was going on while the product was frozen solid, but when it was melted and used as a liquified food product. The nature of that change we have from the directions to the user placed on the can by the maker, viz, "Slow thawing gives best results," and the description of the process in the patent, viz: "The mixture is then frozen solid, and held below the point where decomposition may occur, as by subjecting it to a temperature of zero Fahrenheit, and is maintained frozen until desired for use. When thawed, the egg substance resembles that of the natural egg in its useful physical characteristics and is of much greater commercial value than ordinary frozen egg." It is, then, apparent that, if the frozen product is of the proper character, it can be slowly thawed out and used without resultant decomposition, and by thawing is meant not a careful, close scientific [594] maintenance of exact thermal conditions, but the gradual reduction of the frozen product to a liquid state in the ordinary way a cook would allow a solid to liquify in the place where the cooking

was going on. Under such directions, a baker would naturally allow the product to gradually melt in the atmosphere of the room where he was working, or the cook in her kitchen. And not only is this the case, but if this frozen product is so near decomposition that exact chemical and thermal precautions are necessary to prevent decomposition, then the product is, as an article of food, so close to the danger line as to excite suspicion and not only warrant but demand the closest judicial scrutiny before it is allowed to become an article of food consumption. In this case we find no proof that the treatment of these samples by the Government chemists was unfair or subjected the product to conditions producing more rapid decomposition than if it had been used for baking. As will be seen by the proofs, on February 10, 1911, the Government samples were set apart on ice and on February 14th, were shipped to Washington. When received there the next day they were still frozen solid. They were then delivered to doctors Bacon and Anderson, Government chemists, and on March 7th some of them were packed in ice and sent to Dr. Rosenberger at Philadelphia from the cold storage where they had meanwhile been kept at ten degrees Fahrenheit. From the samples which he received, Dr. Bacon melted two samples "very slowly, according to the direction on the can." They were placed in Mason jars closed with a screw top and rubber bands and allowed to stand at room temperature for ten hours. They were given to Jacobs within an hour after melting and were used by him in the cooking operation. We find no evidence of unfair or improper treatment of the product in this evidence and the suggestion that the odor of the eggs, which Dr. Bacon testified was noticeable as soon as the product melted, came from the sterilizing of Mason jars or from the rubber sealing bands is a mere suggestion not based on facts, and that such jars were improper as receptacles for samples is negatived by the very fact that the claimant's chemists used such jars in part for taking their samples, and there is no proof that in any subsequent use of such samples they detected any odor from the rubber bands at all resembling bad eggs. We are therefore of opinion the liquified samples of the Government, when tested by the experts for bacteriological results and used for cooking, were in a condition fully as favorable to the product as would be its liquified condition when used by bakers and other consumers. And the condition of a product in the hands of a consumer is the place and time to test its fitness for food. Turning from this proof of practical facts to the theories of the expert witness, we find a wide difference of conclusions. As we stated above, the Government witnesses subjected the samples to well known scientific tests, and, in the absence of any opposing tests made by the claimant, we are justified in accepting these tests as correct. Without entering into details, we may summarize such tests as proving in this liquified product recognized products of decomposition; that the product when hypodermically [595] injected into guinea pigs and other animals used in laboratory experiments produced sickness and death when the like administering of fresh egg product had no harmful effect. The tests showed the presence of such bacteria as produce disease, blood poisoning, and death, and are found in animal excreta. From these facts, which are not controverted, the Government experts infer that the product was decom-

posed, while the claimant's experts testify they do not prove decomposition. Indeed, as we understand the contention of the claimant's experts, it is contended, to use the language of Professor Folin of the Harvard Medical School, "the number of bacteria in an unknown product is no index to the degree or extent of the decomposition in that product. I mean that in a bacterial decomposed product there are other factors involved than the mere number of bacteria found in that product at any particular time." Viewing the problem then from the standpoint of decomposed, in the technical meaning of that word, and not from the word as meaning spoiled (for as he himself said, "On terms in common use, such as 'spoiled,' an expert does not really know any more than the person who asks him. It is spoiled to that person"), Professor Folin examined one of Dr. Bacon's samples for the presence of ammonia, which he says is an indication of technical decomposition. Finding none, he concluded there was no decomposition. But such value as this test and the inference drawn from it might ordinarily have, it appears to us the time of such test is as open to the criticism of having been made too soon as Dr. Bacon's was of being made too late. We have already shown that the latter was made under conditions similar to those to which the product was subjected in culinary working conditions. But such we do not find to be the case in Professor Folin's test for ammonia, where he took the product from cold storage and put "the vessel containing the egg in cold water, allowing it to stand; but in all cases, for the first determination, I started the ammonia within two hours after I took the sample out of cold storage." Now in view of the fact he stated that it is not possible to determine the ammonia in the product while frozen, that this frozen product stood in cold water, and that for only two hours, we are not convinced that this testimony throws any helpful light on the question before us, for it is not shown that his sample had liquified to the extent incident to ordinary baking use. It may well be that, in view of the frozen condition of the product initially, its test within two hours, and that meanwhile it was kept standing in cold water, the product was proof against the ammonia test. But, as we have said, this may prove nothing as to this product considered from a food standpoint. Professor Folin admits he purposely omitted to make the tests Bacon had made, and that he did this "because I knew that, in the presence of so much sugar, the subsequent decomposition which would take place was largely the fermentation of the sugar which results in the formation of carbonic acid and which would figure as an acid, and therefore it did not indicate anything in the decomposition of the egg substance." From this it is evident that his test was not to discover whether decomposition of the product as [596] a whole, superinduced, it may be, by sugar, had begun, but whether it was found in the egg product alone. It is therefore clear that bearing in mind the time, method, and limited object of such tests, and his tests may be taken as fairly illustrative of the viewpoint of claimant's experts, they throw no helpful light on the question before us of whether this product, when subjected to conditions incident to ordinary culinary use was decomposed.

Finding, therefore, that this food product was decomposed, and the act providing that for the purposes of the act an article shall be deemed adulterated "if it consists in whole or in part of a filthy, de-

composed, or putrid animal substance," it follows that this product falls within the statutory definition on the ground of decomposition, and it therefore becomes unnecessary for the purposes of this case to pass on the question whether the product, by reason of the addition of sugar, was also to be deemed adulterated. The decree of the court below is therefore reversed, with directions to enter a decree in condemnation in favor of the Government.

UNITED STATES v. 350 SACKS OF "PRINCESS FLOUR"
AND 50 SACKS OF "FANCY MELBA" FLOUR.

(Supreme Court, District of Columbia, March 1, 1912.)

N. J. No. 1768.

Flour containing worms, beetles, and other insects *held* adulterated in that it consisted in whole or in part of a filthy, decomposed, and putrid substance.¹

Libel under section 10 of the Food and Drugs Act. Wm. M. Galt & Co., claimants. Jury waived. Decree of condemnation and forfeiture.

BARNARD, *Judge*. [2] The libelant in this case seeks to condemn the flour described in the libel, because the same consists in part of a filthy, decomposed, and putrid animal and vegetable substance.

The answer of the claimants denies that the said flour is filthy, and denies that it is subject to seizure under act approved June 30, 1906, (34 Stat. 768) known as the pure food law.

The libel was filed September 17, 1909, and at the same time, an order was made permitting the libelant and the claimants to each take two sacks of flour, one from each of said two lots described, for the purposes of examination and analysis. An answer was filed by the claimants, November 23, 1909, and on the 18th of February, 1910, another order was made, permitting the libelant to take two other sacks, one from each of the said lots described, and also for the claimants to take two other sacks, one from each of said lots, for the purpose of analysis for use at the trial.

December 20, 1911, an amendment was made to the libel, by striking out paragraph three, and inserting the following paragraph in lieu thereof:

Your libelant further represents that the said sacks of flour, and each and every one thereof, are adulterated within the meaning and intent, and in violation of, the said act of Congress, approved June 30th, A. D., 1906, in that the said flour consists in part of a filthy, decomposed, and putrid animal and vegetable substance.

The answer was a denial of this paragraph, and the issue so made was set down for hearing before the court without a jury. Testimony was taken in open court, which showed the result of the analysis of the four sacks of flour taken by the libelant, under the permission of the orders of the court aforesaid.

It did not appear that the claimants took any samples, or had any analysis made. The result of the examination of the four sacks taken

¹ Affirmed, Wm. M. Galt & Co. v. United States, p. 588, *post*.

by the Government as samples, was that one of them contained worms, insects, and beetles, aggregating 3,525, and the other three, worms, insects, and beetles, aggregating 1,207, 1,448, and 1,959, respectively.

Experiments were made by the Department of Chemistry, showing that the said flour contained a large number of bacteria that were supposed to be injurious to the human body; and, in addition, to the worms, insects, and beetles, that had been sifted out of the flour, the evidence showed that there remained in the same, cases or husks made by the worms, as well as the excreta from them, all of which, it was claimed, rendered the said flour filthy within the meaning of said act.

There were a great many weevils discovered, and they were defined as the grain weevil, or wingless insects, which required a period of some six weeks, in warm weather, for full growth and development, during which time they passed through four distinct stages of existence, first in the form of the egg, then the form of the larva, then in the pupa form, and finally reaching the adult form; and that after maturing, these insects might live for several months, and possibly for a year. In cold weather a longer time was necessary for their growth.

That the beetle known as "flour-beetle," comes from a larva, or worm, about half an inch long, and it breeds in flour and grain. Several of these beetles, in the larva state, or in the adult state, appeared to be in said samples.

[3] The evidence was that the flour was injuriously affected by the presence of such worms, insects, and beetles, by reason of their feeding on the gluten, and thereby destroying the strength and value of the flour, and rendering it unfit for making bread, or other domestic use, even if the foreign, filthy matter could be bolted or sifted out of it.

The sixth paragraph of section 7, of said act of Congress, authorizes condemnation of food offered for sale, if it consists in whole or in part of a filthy substance, and it is under this section of the law that the libel was filed.

No proof was offered by the libelant, or by the claimants, as to the condition of the other sacks of flour that were seized, except such as might be inferred from the condition of the four sacks analyzed by the Government; and counsel for the claimants contends that the court is without power to guess at their condition, as the four sacks taken may have been all that were so affected.

It appears that the four sacks taken were from different locations in the several piles of sacks, and it is argued on behalf of the Government, that all the sacks seized were in a position to become affected by the dirt and filth from a stable near by, and that it is fair to presume that all the sacks of flour of the same brand, and being in the same general neighborhood, were all similarly affected by the presence of these worms, insects, and beetles.

No authorities directly in point have been called to the court's attention, which would seem to control a decision under the facts in this case.

In *Shawnee Milling Company v. Temple*, 179 Fed. 517, the court considers section 7 of the said statute, and in respect thereto the act is upheld, notwithstanding no standard for pure food is fixed, or can be fixed, as is done with reference to drugs.

The court says, page 524,

It is a fact most obvious that no standard could be fixed other than was done by Congress. The one provision as to food is that it shall not be mixed so as to reduce or lower or injuriously affect its quality or strength. Another provision is that some substance shall not be substituted, wholly or in part, for the article. Another provision is that no valuable constituent of the article shall be abstracted. Another provision is that it shall not be mixed, colored, powdered, coated, or stained, in a manner whereby damage or inferiority is concealed. Another provision is that poisonous or other deleterious ingredients shall not be added. Still another provision is that filthy, decomposed, or putrid substances shall not be added.

From the testimony it is not clear that weevils and beetles may not come into flour while in storage, without any fault of the owner, and the argument is made that if they are liable to so infest or inhabit sacks or barrels containing flour, that their appearance is a thing that it was not contemplated by the said act of Congress to prevent. That it is not a false branding, or an adulteration made by the manufacturer or seller, but a natural result liable to happen with the best of care, and that its effect is not to wholly destroy the value or nutritive qualities of the flour, but only to cheapen it, provided the flour is again properly sifted or bolted.

The court is unable to accept this argument in behalf of the claimants, because it seems to the court that the purpose of the act was to prevent the sale of deleterious food stuffs, no matter how they became such; and that if a merchant should have in his stock flour, or other food product, and be offering the same for sale, under names which the public might anticipate guaranteed a good quality, and the said food stuffs had become filthy and deleterious by reason of long standing in exposed situations, and had become inhabited by worms, insects, and beetles, such as shown by the testimony in this case as to the four [4] sacks which were examined, the law would apply, and such food stuffs would be subject to condemnation under Section 10 of the said act.

Considering the testimony as presented, and the absence of testimony on behalf of the claimants, the court is forced to the conclusion that if other samples had been taken and analyzed, their examination would have shown similar conditions to those in the four sacks actually examined.

That if they had shown to the contrary, it might be assumed that the claimants would have put in evidence to that effect, rather than leave the matter to the presumption necessarily arising from the examination of the samples taken.

Finding as matter of fact from the evidence that the said several sacks of flour are in a filthy condition, under the provisions of said act, by reason of the presence of the said worms, insects, and beetles, in such quantities as shown, and from the condition which they have produced in the said flour, the court is of the opinion that the said several sacks of flour, now in the warehouse of the claimants, should be condemned and destroyed, unless the claimants shall give bond to dispose of the same in some manner not contrary to the provisions of the said act of Congress.

UNITED STATES v. 307 CASES CONFECTIONERY.

(District Court, D. Massachusetts, March 6, 1912.)

N. J. No. 1642.

Confectionery containing a trace of talc *held* not adulterated.

Libel under section 10 of the Food and Drugs Act. R. C. Boeckel, Henry Heide, the National Candy Co., and S. Fisher & Co. claimants. Jury trial. Verdict for claimants.¹

DODGE, *District Judge* (charge to the jury). [2] The printed forms of verdicts which will go out with you when you go out to consider this case are a little different from those you have used before. A specimen will be enough: "The jury find that the candy eggs contained in 131 boxes are"—then there is a blank—"adulterated." That verdict you will complete either by omitting or by inserting, according as you shall find, the word "not" in that blank. The foreman will sign that verdict when it is agreed upon, in the usual way. There will be one verdict to be rendered in each of these three cases, and you have a form applying to each one. The only difference between the three cases, the only respect in which one differs from another, is that in case No. 395 the United States proceeds against 96 boxes of candy peaches and pears. Now for the present purposes you may treat this case as if it were a proceeding against the candy pears only. The Government admits that it has nothing to object to in the peaches, and you may disregard them. You may treat this case as if it related to the pears and nothing else, and when your verdict is rendered we will see what to do with the peaches.

This, as you have heard, gentlemen, is a prosecution under the pure food law, so-called; and we shall all agree that of all the laws ever passed by Congress it is probable that that is one of the most useful, and one which has benefited the people of this country, probably, as much as any other. There is no question that such a law should be properly enforced, just as any other law of Congress should be properly enforced. It is, nevertheless, true that that law, like all the other laws which Congress passes, is a law passed for practical purposes, to be considered by practical people, and not to be given an unduly theoretical construction.

The law says, as you have heard several times while this case has been on trial, that all goods in interstate commerce which are adulterated are liable to be forfeited to the United States—all goods within the act, goods which come within the pure food law. The law also says in so many words that candy is adulterated within the meaning of the law if it contains talc. There is no dispute about that. Those are the words of the law.

The Government in seeking to have these goods declared forfeited rests upon the mere words of the law. The Government says: "This candy had talc in it; never mind anything more, it has talc in it; therefore it is adulterated under that law."

Well, gentlemen, the Government does not try to show you in this case that the goods are injurious to anybody. You have no such

¹ Pending on writ of error in the Circuit Court of Appeals for the First Circuit.

question as that before you. You are not to inquire, for any purpose in this case, whether the talc would hurt anybody or whether it would not. So far I agree with the contention of the Government counsel. The Government does not try, and there is no question for you to consider, as to whether talc is injurious, or whether talc in the quantities which these Government experts have described is injurious. There is no such question before you here.

It seems to me that to say that the goods are necessarily adulterated under the law as it stands, if only any talc, no matter how little, may be found in them, is [3] not the proper construction of the law. Such a claim might be good, undoubtedly is good, in strict logic; but does it follow that for the purposes for which this law was intended it is good? I do not think it follows that any such thing was necessarily the intent of the law when it was passed. We must suppose that the law was passed by reasonable and practical men for use among reasonable and practical men. I take on that question a little different view from that taken by the Government. It is the duty of the court to instruct the jury in matters of law. Questions of fact it is the duty of the court to submit entirely to the jury. The court should not undertake to interfere with any question of fact, but questions of law are for the court, and if the court makes any mistake in ruling upon them the party against whom he rules has a perfect remedy by appeal.

Now, I shall instruct you, gentlemen, that the Government in order to prove these goods adulterated, and to be entitled to a verdict from you that they are adulterated, has the burden of satisfying you by a fair preponderance of the evidence, in the first place, that there was talc in these candies; and, in the second place, that there was something beyond a mere chemical trace of talc, that is to say, a quantity sufficient to enable you, as reasonable and practical men, to say that it was significant or important for some possible practical purpose.

Let us take first the question, Was there any talc in this candy? The Government has the burden to satisfy you of that, in the first place, by a fair preponderance of the evidence. If it has failed to do that, you should find for the defendant, without going any further. On the one side you have the evidence of the experts introduced by the Government. They tell you they found talc, as a result of their examination. They undertake to tell you or to estimate for you how much talc they found. Now it is for you to say how far you will believe them. You have heard them cross-examined. They have been made to detail before you the manner in which they treated these candies in their analyses, and the reasons which they have for believing that what they found in the candy was talc. All that evidence you are to consider, and consider fairly. You are to say how far you will believe it. If there is any evidence the other way, you are to consider that in the same manner. You are to say, then, which way to your minds the preponderance, the fair preponderance, of the evidence has been.

The witnesses for the Government, as I understand them, have told you that they found in these candies, as a result of their analyses, mineral matter. They have not undertaken to claim to you that all of it was talc, at least not all of them have made that claim. There was

mineral matter. Talc is mineral matter, but not all mineral matter is talc. What the Government has to prove to you is, in the first place, that there was talc in these candies, and you must say whether that has been proved by a fair preponderance of the evidence or not.

If you are so satisfied by a fair preponderance of the evidence that the candy did contain talc, I shall instruct you that it is still necessary to consider to some extent the amount of talc that there was there.

We have been told in the course of this case that there are no substances which are chemically pure. We have been told in the course of this case that there is mineral matter to a greater or less quantity, contained in every ingredient of this candy. Gelatine enters into it, and gelatine, they tell us, contains mineral matter, a trace, a small quantity, however much it may be. Chocolate enters into it; in that we are told there is mineral matter. Sugar enters into it; in that we are told there is also mineral matter.

[4] In considering the quantity of a substance like this, not claimed to be poisonous, it seems to me that of a quantity so small as not to be appreciable for any practical purpose whatever, the law does not take account. Things which are entirely trifling, insignificant, unsubstantial, of no consequence for any practical purpose, as a general rule the law does not take account of. Of course, gentlemen, we are to give to this law a fair and honest construction, for the purpose of enabling it to be carried out to accomplish that which it was intended to accomplish. It is important that the law should be strictly enforced. But it does not follow from that that we are required to give the law a construction or an effect purely theoretical, as opposed to a practical construction.

If you have been satisfied by a fair preponderance of the evidence that there is talc in these candies, I instruct you that you should also be satisfied, in order to find for the Government, by a fair preponderance of the evidence, that there is in the candies a quantity of talc sufficiently appreciable to enable you, as reasonable men, to regard it as significant or important for some practical purpose. I shall instruct you, gentlemen, that it is not merely a quantity so small that all the difference it could possibly make for any purpose whatever would be only imaginary or theoretical. That is not enough to enable you to find these eggs adulterated within the meaning of this law. A mere mechanical trace, only to be detected by a skillful chemist, would not, as I shall instruct you, be sufficient.

There must be such a quantity, at least, as you would say, supposing that were the question, you could possibly regard as enough to show on the manufacturer's part some purpose of deception. If it were so insignificant and small that you could not say, if the question of deception on the manufacturer's part were raised here, that he could possibly have been supposed to have any purpose of deception, if he used only so small a quantity as that, then I shall instruct you that there was not enough talc in this candy to justify your finding it adulterated within the meaning of the act.

I think that the law means that there should be at least so much of the forbidden substance in this candy as you would say, if that were the question, might possibly be considered by you as enough to show

a want of that extreme care expected of the manufacturer of candies, in guarding the purity of his product; and if you find that the quantity of talc was so small that, no matter what extreme care the manufacturer had to use, yet he would not be guilty of any failure whatever in that extreme care if only so much talc as that got in, then that would not be a sufficient quantity of talc to warrant you in finding the candies adulterated within the meaning of the law.

Now, gentlemen, it is not necessary that you should find that there was enough talc to injure or hurt any consumer of those candies, for the purpose of this case. That is not the question here. Undoubtedly it may be true that a quantity so small that it could not possibly hurt any consumer, would be within the meaning of the law, and would require you to find the candies adulterated. All that I mean to say is that, in my opinion, and I shall so instruct you, there should be at least some quantity beyond a mere chemical trace, something which you can regard as going beyond what is merely imaginary or merely theoretical.

Counsel can remind me of anything they desire me to say further.

Mr. FURBER. Your honor suggested that if it were only such a quantity as would be detected by a skillful chemist. I suggest, of course, that a layman could never detect it; it would always have to be a skillful chemist who could ever detect it.

[5] COURT. I understand you desire to except to that part of my charge?

Mr. FURBER. Yes.

COURT. Very good. Anything else?

Mr. FURBER. Yes.

COURT. You may save your exceptions with the stenographer. My inquiry now is whether I have omitted to say anything I indicated to counsel I would say?

Mr. FURBER. Does your honor mean to charge that if a layman could not detect this, it would not be adulterated?

COURT. That is not a question which I feel called upon to answer, Mr. Furber. You may except to what I have said.

Mr. FURBER. I am merely trying to get some basis for my determination as a lawyer. May I have an opportunity to except to portions of your honor's charge after it is written out, in order that I may make the exceptions definite, or does your honor insist that I should do it now?

COURT. What you have to do now is to indicate the parts of the charge to which you except. That is all it is necessary to do at present.

Mr. FURBER. I except to what I have just suggested. I except to the portion of the charge which relates—I except to all of your honor's charge that goes beyond saying that merely the presence of talc is sufficient. Perhaps that is the easiest way of stating it, if your honor will allow me all my rights under that?

COURT. Certainly; I think a brief indication is all that is necessary—enough to give the other side notice. Have the defendants any exceptions?

Mr. BEAL. We have none.

UNITED STATES v. AUERBACH & SONS.

(Circuit Court, S. D. New York, April 4, 1912.)

N. J. No. 1803.

An article labeled "Auerbach's Red Band Brand Milk Chocolate, Warranted Absolutely Pure * * *," which contained a quantity of wheat starch, held not adulterated or misbranded on account of containing starch, the presence of which was not declared on the label.

Information charging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of not guilty.

HOLT, *District Judge* (charge to the jury). [2] The charge in the information in this case is that the defendant shipped in interstate commerce on the 25th day of February, 1911, from the City of New York to the City of Colorado Springs, consigned to the J. T. Clough Mercantile Company, a certain article, being and purporting to be an article of food and an article used for food by man, to wit, milk chocolate, in a package containing the label "Auerbach Red Band Brand Sweet Milk Chocolate, Warranted to be a pure and delicious confection," which said article shipped as aforesaid was adulterated in that a certain substance, to wit, wheat starch, has been substituted wholly or in part for the article. And it is further alleged that the article was adulterated, in that the aforesaid substance, wheat starch, has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

Now the section of the pure food act under which this information is brought, provides that for the purposes of the act, an article shall be deemed to be adulterated, first, in the case of drugs:

Then follows a description of what is adulteration in the case of drugs.

Then in the case of confectionery:

If it contains terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound or narcotic drug.

If any confectionery contains any of those articles, it is adulterated, and the act does not provide that the introduction of anything else shall constitute the adulteration of confectionery.

Now the defendant claims that this is a confectionery, and it is so described on the outside of the package. It is also described as a food. Now, it is for you to say, gentlemen, in the first place, whether it is a food or a confection, or both. I do not understand that there is any claim that there is any evidence in this case that they violated the provisions of the pure food law in relation to confectionery.

Confectionery, of course, often contains a great many complicated combinations of different substances, and Congress has not undertaken to say that it shall not consist of combinations, but it says that it shall not contain any of these things mentioned in the act. This milk chocolate does not contain any of such things. Therefore if this is a confection, in your opinion, I charge you that you should acquit the defendant, unless you also hold that it is a food, and violates some food provision of the act.

[3] Now, the act says in the case of food :

First: If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

It is urged in this case, that wheat starch had been packed with it so as to reduce its strength and injuriously affect its quality or strength.

Second: If any substance has been substituted wholly or in part for the article.

The Government alleges that wheat starch has been substituted for the article.

Now, the act in the case of food generally applies—or some part of it at least applies, to a single substance of food such as flour or meat, or some original, simple article, but there are a great many things which constitute food, which are compounds, and the act makes provisions in regard to that, and it says, “An article of food which does not contain any added poisonous or other added deleterious ingredients”—and that is conceded in this case of milk chocolate—shall not be deemed to be adulterated in the following cases:

First, in the case of mixtures or compounds which may be now or from time to time hereafter may be known as articles of food under their own distinctive name which shall not be an imitation of or offered for sale under the distinctive name of another article, and the act provides that the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

Now, this article contains a statement that it is manufactured by Auerbach & Company of New York City, which complies with that provision.

Now this article is sold as milk chocolate, which indicates upon its face that it is a compound or mixture. There is no such thing as milk chocolate as a natural single substance. There is chocolate and there is milk, and there is combined in this, therefore, something that makes milk chocolate. And, if in your opinion, this article comes within this provision relating to mixtures or compounds and is to be regarded as an article of food, and is an article which does not contain any added poisonous or deleterious ingredients, and is known under its own distinctive name, and is not an imitation of or offered for sale under the distinctive name of another article, and the name and the place of manufacture is on the brand, why, then you should acquit the defendant.

So that the question comes down to this whether milk chocolate commercially means something which does not contain any wheat starch. It is admitted that the insertion of starch does not make it unwholesome. The defendant claims that he put in the wheat starch at a time before there was any action by the Government objecting to it; that it was authorized by formulas for the manufacture of milk chocolate before the pure food law was adopted, and that the reason why he put it in was so as to give it greater consistency, so it would be a better commercial article, particularly for warm climates.

Now this, as I say, is a compound. There is milk in it and there is cocoa—a buttery chocolate material. There is powdered sugar—300 pounds of powdered sugar in the formula used—more sugar than all the other materials put together. But the Government does not com-

plain that they do not put outside the package that there is sugar in it. The complaint is, that they do not put outside the package that there is wheat starch in it. Now, if milk chocolate in the ordinary commercial sense includes all those things, that is a term which may be used, but if it does not include, then, if, to the ordinary person, milk chocolate can not be properly made and is not properly made with wheat starch inserted in it, why, then the act of the defendant is not protected by this provision [for] of the act with regard to compounds. Now, that is a question for you gentlemen. In the first place, was it a confection? If it is, and it is not a food, why, you should acquit.

In the second place, is it a food? And, if it is a food, has a substance been mixed with it so as to reduce or lower or injuriously affect its quality or strength, or has a substance been substituted wholly or in part for the article. Now, it is for you to say, in the first place, whether that provision of the act applies to such a compound as this. If they were simply selling a pure original article, like chocolate, or like sugar, and then there was mixed with it wheat flour, why, the act would undoubtedly apply.

But it seems to me that this article we are dealing with, is a compound called milk chocolate, and the only question in the case is whether this is a milk chocolate; whether it is permissible in the ordinary meaning of the trade term to make milk chocolate, by putting in such a proportion of wheat flour as may in the opinion of the manufacturer improve it as an article of commerce without essentially affecting or injuring it as milk chocolate.

Gentlemen, I leave the case with you.

UNITED STATES v. GIDDEN.

(Circuit Court, S. D. New York, May 3, 1912.)

N. J. No. 1693.

Tomato paste found to contain a large number of bacteria, mold filaments, yeasts and spores, *held* adulterated in that it consisted in whole or in part of a filthy, decomposed, and putrid vegetable substance.

Information charging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

MAYER, *Judge* (charge to the jury). [1] The information in this case charges the defendant, Herman M. Gidden, with unlawfully shipping and delivering for shipment from the city of New York, State of New York, and Southern District of New York, to Philadelphia, Pennsylvania, consigned to Kurtz Brothers, a certain article used for food by man, to wit, tomato paste, in fifty cases, packages and containers, all labeled with the Italian name that you heard spoken of and trans- [2] lated, and then the information says that this tomato paste or sauce or substance shipped as charged was adulterated, contrary to law, in that it consisted in whole or in part of a filthy, putrid, or decomposed vegetable substance.

The case has been tried by counsel for the Government and counsel for the defendant fairly and courteously and in a way to assist you in arriving at a speedy determination one way or the other. The statute

under which this information is brought is the one known as the "Food and Drugs Act," and the one you have doubtless all heard of, and perhaps sat on juries and read about, popularly called the pure food law. It is provided in that statute under section 7 thereof and subdivision sixth as follows:

"That for the purposes of this act an article shall be deemed to be adulterated if it consists in whole or in part of a filthy, decomposed, or putrid, animal, or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter," and a person becomes subject to inquiry and prosecution if that sort of substance comes under this provision. The introduction into any State from any other State of any article of food which is adulterated is prohibited, and the person who ships such article of food from one State to another shall be guilty of a misdemeanor.

It is stipulated in this case that the subject matter of the controversy was a subject of interstate commerce, so that there is nothing left in the case for you to determine except whether this food was adulterated, and whether it was adulterated is for you to determine within the definition that I have just read to you.

The act in question is a beneficent law intended to safeguard the people in their daily lives, and to the end that their health may be conserved. The defendant is entitled to every safeguard upon his part that the law throws around him, and no matter what the facts may be, the defendant is always entitled to have the Government prove its case beyond a reasonable doubt. You have sat on juries no doubt earlier in the month, and you know that a reasonable doubt, as you have probably been told, is a doubt with some reason to it; it is not a mere guess or caprice or surmise, but a question of some reason, and if the Government does not prove its case beyond a reasonable doubt the defendant is entitled to an acquittal, but if it does, then the defendant must be convicted.

The fact that the defendant says that he did not intend to violate the law is not the question in the case. The question is was the law violated? Now, I think it is hardly necessary to attempt any very fine or close or scientific definition of the various words of the statute. In plain English, that you and I use every day, these words mean the substance was rotten, that it was unfit for food for man, and therefore of course, it was a danger to those to whom this would come. Manifestly, the Government is rarely in the position of proving by actual physical facts that it saw a food product made, and therefore the Government is of necessity compelled to resort to the introduction of expert testimony, and to that end, through its Department of Agriculture, it has examinations made, and it is for you to say in this case whether the exhibits here presented, which were concededly taken from this shipment, were kept step by step in such a careful condition as to warrant you to say that the examination made by the Government experts was fair and just and had no purpose in it other than to discover the truth. You are entirely competent to determine that from the evidence before you. It has been shown to you that the inspector who originally took this part of the shipment turned it over to the Department of Agriculture, and each one of these experts got one or the other samples in [3] due course and made the examina-

tions they described. It is for you to say whether their examinations as testified to, together with their testimony as to the effects and results of that examination, show that this substance was, as the statute says, in whole or in part a filthy, decomposed or putrid vegetable substance.

There remains, as I recall it, only one other question to which your attention should be directed. It has been suggested by the defense that between the time the tomato is ready for canning and the time that it is actually put into the cans, the process of nature may be such as to produce a decomposed or putrid condition. The learned counsel for the Government says that such a contention does not go to the right of the case, and I charge you that his view of the matter in that regard is right. What happened between the time the tomato was found in the factory and what happened after it had stayed there for a while and before it was canned is entirely immaterial under this statute. The question is whether the substance which is the subject matter here referred to at the time that it became the object of interstate shipment was in such a condition. So as to be entirely fair to the defendant, you may take into consideration, under the rules which I have laid down, the testimony of the Government expert who went around to some canning factories here and told you it took a considerable length of time before a healthy tomato could become decomposed or putrid; and also the testimony of Dr. Dunbar as to the practical experiment made in respect of keeping healthy tomatoes.

This is a case that is comparatively simple of solution one way or the other. You must give the defendant every reasonable doubt to which he is entitled, and, under the rules laid down, find your verdict.

UNITED STATES v. AMERICAN CHICLE CO.

(District Court, D. Oregon, May 10, 1912.)

N. J. No. 1939.

An article labeled "Beeman's Pepsin Chewing Gum" held misbranded because of false statements on the label.

Information alleging violation of section 2, Food and Drugs Act. Jury trial. Verdict of guilty.

BEAN, *District Judge* (charge to the jury). [2] This is a prosecution under what is known as the Food and Drug Act, passed by Congress in June, 1906, and which makes it an offense, a crime or a misdemeanor to introduce into any State or Territory any article of food or drug which is adulterated or misbranded. The charge here is that the defendant in July, 1910, shipped from this State into the State of Washington, certain packages of chewing gum, and that this chewing gum was misbranded. The indictment contains two counts, or in other words, the facts upon which the Government relies for a conviction are charged in two separate counts in the indictment, but the only difference between the two is that in one it is charged that chewing gum is a food and in the other that it is a drug. It is alleged that these packages contained labels reading "Beeman's Pepsin Chewing Gum Trade Mark Registered U. S.

Patent Office. A delicious remedy for all forms of indigestion. Originated by the Beeman Chemical Company. Manufactured by American Chiclé Company, Successor, Incorporated. Cleveland, Ohio, U. S. A. Price 5 cents. Each of the enclosed tablets contains sufficient Beeman's Pure Pepsin to digest 2000 grains of food. Guaranteed by American Chiclé Company under the Food & Drugs Act June 30, 1906. Serial No. 1557." It is alleged in each count of the information that this label was false and misleading and that the package was therefore misbranded in that each of the tablets enclosed in the package contained no pepsin which would be and was effectual to accomplish the purpose for which pepsin is ordinarily used, and that the statement "Beeman's Pepsin Chewing Gum" upon the package and label was calculated to and did convey to intending purchasers the idea that a substantial amount of pepsin was present therein and sufficient to aid the digestion of persons using such drug. Then it is also charged that the statement on the label that such package contained pepsin sufficient to digest 2,000 grains of food was false and misleading for the reason that it requires not less than forty milligrams of pure pepsin to digest 2,000 grains of food, whereas in truth and in fact there was no pepsin in these packages at all.

The defendant has entered a plea of not guilty and that plea puts in issue the material allegations of the information. It is admitted by the defendant, however, that it manufactured the gum and that it shipped it to the State of Washington, so there is [3] no issue upon that question. But it denies that the gum was in fact misbranded and that is the question for you to determine from the testimony.

The particular charge of misbranding and the one to which your attention is especially directed is the statement on the label to the effect that each of the enclosed tablets contains sufficient Beeman's pure pepsin to digest 2,000 grains of food. The pure food law says that the term "Misbranding" shall "apply to all drugs or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular" and as applied to food if it shall be labeled or branded so as to deceive or mislead the purchaser. So that there are two questions in the case, first whether the brand upon that label was calculated to mislead the purchaser; in other words whether the statement on the label that it contained pepsin was, if false, such a statement as would be calculated to mislead one who desired to purchase the article and if that statement is false and was so calculated to mislead the purchaser then it was a misbranding within the meaning of the statute. Again, it was perhaps not necessary for the defendant company to state on the label the quantity of pepsin contained in the gum, but when it assumed to do so the law imposes upon it the duty of stating the truth in reference to the matter and if it made a false statement it was misbranding within the meaning of this statute and therefore if you believe from the testimony that the statement on the label that each of the tablets contained sufficient pure pepsin to digest 2,000 grains of food is false, it was misbranding within the meaning of this statute, and the defendant would be guilty of a violation of the law.

Now, in that connection it is proper to allude to the manner in which this gum was manufactured and to the results of the manufacturing process. The law applies to an article as it is put upon the market, so when these people state on its label that each package contains pure pepsin sufficient to digest 2,000 grains of food, it was a false statement unless the article as put on the market contained that amount of pepsin. The law requires the statement on the label to be a true statement of the contents of the package in this regard, and if it is false the defendant is guilty of a violation of the statute. There is evidence tending to show that the defendant company has filed in a public office a trade-mark. I believe the trade-mark as it appears from the certified copy of the filing is "Beeman's Chewing Gum." The filing of that trade-mark would not give the defendant the right to put a false statement upon the label of their manufactured article. It would probably give them the right to use the name of Beeman's Chewing Gum, or Beeman's Pepsin Chewing Gum—whatever the trade-mark is—and protect them in that right and prevent an infringement or use of it by any other manufacturing company but it would be no defense or excuse for misbranding the goods. Again the statute provides that goods that are mixtures or compounds used for food and sold under a distinctive name, which do not contain any added poisonous or deleterious ingredients shall not be deemed to be misbranded. For instance, if there is a food product which is composed of divers and sundry ingredients and is sold in the market under a distinctive trade name, the mere fact that it is sold under that name is not a misbranding, but if put on the market under a distinctive trade name and in addition to that the manufacturer undertakes to state the contents and states those falsely he does violate the statute. To illustrate, it was said in argument here that a product known as Coca-Cola was sold on the market under the name of Coca-Cola and that it had been held by some court that that was not a misbranding within the meaning of the statute. If that doctrine has been announced and of that I have no knowledge and it is not necessary at this time for the court to indicate any views upon that subject, it would only be an illustration of what I am intending to convey by the term "distinctive name" so that if the product was branded and sold on the market as Coca-Cola, although that might not be a misbranding within the meaning [4] of the statute yet any manufacturer who, in addition to that, put on the label a statement to the effect that that article contains certain ingredients and that statement was false, it would be a misbranding. So in this case. Again it is said where an article is sold like, for instance, Beeman's Pepsin Chewing Gum under that name alone, it would not be a misbranding if it contained no pepsin. Now, I am not prepared to say whether that is the law or not nor is it necessary in this case because here the defendant has gone beyond that and not only branded the article "Beeman's Pepsin Chewing Gum" but it has undertaken to state and has stated that it contains pepsin in sufficient quantity to digest 2,000 grains of food and that the Government charges to be false, and that is one of the issues and the important issue in the case.

The burden is on the Government to sustain the charge made in the information. In other words it must prove that this label was either misleading and calculated to deceive the public or that it is false.

In other words, that fact that it was false would prove that it was misleading as far as this case is concerned. The statement on the package is that it contained pepsin sufficient to digest a certain quantity of food. That statement is either true or false. If false it is a misbranding; if true it is not misbranding.

The label contains, as you will remember, another statement, and that is that "this package is a delicious remedy for all forms of indigestion." There is no charge in the information that the defendant violated the statute by this statement on the label and indeed the courts have held that that is not misbranding within the meaning of the pure food law. The mere statement on a package of this kind that it contains a delicious remedy for all forms of indigestion would not be misbranding and there is no charge in this case that it is.

Now during this trial there has been a great deal of expert testimony—men and a woman skilled, or professing to be skilled in the art of chemistry have been called and testified as witnesses before the jury, and they have given the results of their analyses of this product and their conclusions from such analyses. This testimony has been admitted to advise the jury, but you are not bound to follow the testimony of any of these experts or all of them unless you are satisfied—unless it meets with your approval. You are to find the facts in this case from the testimony—all the testimony as you understand it, and in weighing this testimony, you will not of course overlook the fact that the man who actually manufactured this product testified before you in reference to its ingredients and the amount of pepsin, if any, put in, and the manner in which it was manufactured, and with that testimony together with the expert testimony that has been given here it is for you to determine from this record whether or not the label was false or misleading and that you must determine from the evidence—from the testimony as you understand it and according to your own conclusion, and not the conclusions of any one else.

Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which a witness testifies, his appearance on the witness stand, evidence affecting his credibility, or his interest in the controversy as it may be manifested at the trial, or may appear during the trial.

Mr. MAGUIRE. Just one thing. I would like to have the instruction given in accordance with the law laid down in *United States v. 443 Cans of Frozen Egg Products*, and that the condition of the product in the hands of the consumer is the place and time to test its fitness.

COURT. I have already said to the jury that the question here is whether this label was true or false as applied to the product after it was manufactured and at the time it was shipped and put on the market.

Mr. COLE. Just simply to follow out, I want to save the same points I have been trying to save all the way through this case, for that reason I want to save exceptions [5] to the court's refusal to give the instructions requested by the defendants, Nos. 1, 2, 3, 4—I think you gave 5, didn't you?

COURT. Yes, I gave five.

Mr. COLE. Nos. 6, 7, 8, 9, 10, 11, 12, 13, 14, 15. And also save an exception to that part of the court's instruction in reference to the 2,000 grains of food. I don't remember just the wording.

COURT. That will be sufficient for the record. That calls my attention to a matter that I overlooked.

As I said to you, Gentlemen, this information contains two counts. In other words it is charged that the alleged misbranded article was a food, and it is also charged that it is a drug. I suppose the district attorney, in drawing the indictment was in doubt about that so he charged it both ways, but you can only find the defendant guilty on one or the other of these counts, if you find him guilty at all, for it must be either a drug or a food. If it is a food and misbranded, it is a violation of the statute. If it is a drug and misbranded, it is a violation of the statute. Now, these terms are defined in the statute: "The term 'drug' as used in this act shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation or prevention of disease of either man or other animals. The term 'food' as used herein shall include all articles used for food, drink, confectionery, or condiment by man or other animals whether simple, mixed or compound," and I think it must be a question of fact for you to determine from this testimony whether this is a food or a drug.

UNITED STATES v. J. L. HOPKINS & CO.

(Circuit Court, S. D. New York, May 31, 1912.)

N. J. No. 1881.

A drug product labeled "Alex. Senna, Broken, U. S. P.," held not misbranded.

Information in four counts alleging violation of section 2 of the Food and Drugs Act. First and second counts dismissed. Jury trial. Directed verdict for defendant on third count. Verdict of not guilty on fourth count.

STATEMENT OF FACTS.

[1] In May, 1910, the United States attorney for the Southern District of New York, acting upon reports by the Secretary of Agriculture, filed in the Circuit Court of the United States for said district an information, and on September 23, 1911, another information in four counts, against J. L. Hopkins & Co., a corporation, New York, N. Y., charging shipment by said company, in violation of the Food and Drugs Act—

(1) On or about September 1, 1909, from the State of New York into the State of Virginia of a quantity of gum tragacanth which was adulterated and misbranded. The product was labeled "5 lbs., No. 1 Tragacanth Gum U. S. P. (astragalus gummifer) powd. J. L. Hopkins & Co., New York." Adulteration was alleged in the first count of the last information filed for the reason that the product was sold under and by a name recognized in the United States Pharmacopœia, to wit, gum tragacanth, and differed from the standard of strength, quality, and purity as determined by the test laid down therein at the time of shipment and investigation, in that it was not

gum tragacanth and was not a gummy exudation from *Astragalus gummifer* Labillardiere or from other species of astragalus, but was a powdered Indian gum, and also in that it failed to conform to the tests laid down in said Pharmacopœia, among others the tests by sodium hydroxide and iodine and [2] alcohol, and the standard of strength, quality, or purity was not stated on the package except the false statement that the product conformed to the standard prescribed in the United States Pharmacopœia and its strength and quality fell below the professed standard and quality under which it was sold, in that it was sold as gum tragacanth of the standard of the United States Pharmacopœia, and was not such, but was of the character hereinbefore described. Misbranding was alleged in count 2 of the last information filed, for the reason that the product was labeled as set forth above, so as to deceive the purchaser or purchasers, in that the package and label of the article bore statements regarding it and the ingredients and substances contained therein which were false and misleading in that they stated that the article was gum tragacanth of the standard prescribed in the United States Pharmacopœia, whereas it was not gum tragacanth, but was Indian gum, and was not of the standard prescribed by the United States Pharmacopœia.

(2) On or about February 24, 1910, from the State of New York into the State of California of a quantity of senna leaves which were alleged to have been adulterated and misbranded. The product was labeled: "412 Alex. Senna Broken U. S. P., From J. L. Hopkins & Co., under the Food and Drug Act June 30, 1906, Serial 3236."

Adulteration of this product was alleged in the third count of the last information filed, for the reason that it was sold under and by a name recognized in the United States Pharmacopœia, to wit, senna leaves, and differed from the standard of strength, quality, and purity as determined by the test laid down therein at the times of shipment and investigation, in that it contained stalks, stones, seeds, pebbles, and other substances foreign to senna leaves, and the standard of strength, quality, or purity was not stated upon the package excepting the false statement that the article was of the standard prescribed in the United States Pharmacopœia and certain substances, to wit, stalks, seeds, pebbles, and other foreign substances, had been substituted in part for the article, which were not declared, and its strength and purity fell below the professed standard and quality under which it was sold; that is to say, it was sold as Alexandria senna leaves, whereas it was not such, but was as above described. Misbranding was alleged in count 4 of the last information filed, for the reason that the product was labeled as set forth above, so as to mislead the purchaser or purchasers thereof, in that the package and label of the product bore statements regarding it and the ingredients and substances contained therein which were [3] false and misleading in that they bore statements to the effect that the article consisted entirely of senna leaves of the standard prescribed by the United States Pharmacopœia, whereas it did not, but consisted of a mixture of senna leaves, with stalks, seeds, pebbles, and other foreign substances.

On April 25, 1911, the case covering the shipment of the gum tragacanth having come on for trial, counsel for defendants moved

to dismiss the information filed in May, 1910, on several grounds, the chief of which were that the information did not contain allegations showing that notice had been given to the defendant by the Department of Agriculture or that a hearing had been had, and the court sustained the motion and on September 23 the new information in four counts was filed covering the shipments of gum tragacanth and senna leaves. On October 2, 1911, defendants filed their plea and answer, and on February 13, 1912, the court rendered the following opinion striking out two of the pleas by defendant.

HOUGH, *District Judge*. Having been called upon to plead, defendant offers a written document entitled "Plea and Answer," whereupon the prosecution moves to quash (i. e., strike out) as irrelevant or improper most of said written instrument.

An examination of the "Plea and Answer" shows it to consist of four parts:

1st. A declaration that defendant is not guilty;

2d. That prosecution is barred by the statute of limitations;

3d. That defendant was formerly acquitted of the same misdemeanors as are charged in the present information;

4th. A statement which may be summarized as follows, viz: Long before the passage of the pure food act, gum tragacanth was a well known article of commerce. It is a vegetable gum, exuding from many varieties of plants, which plants exist for the most part in Asia, but all such vegetable gums having the same properties were known as tragacanth. The United States Pharmacopœia (8th ed., Sept. 1909) is a publication which (for the purposes of the pure food law) fixes the standard by which the quality of drugs shall be determined. The edition of the Pharmacopœia above referred to declares in its preface that "the standards of purity and strength (described in the book) are intended to apply to substances used solely for medicinal purposes and when professionally bought, sold and dispensed as such."

Said book contains a complete list of drugs, of which "a medicine dose" is prescribed, and neither tragacanth nor senna is on that list.

In May, 1909, defendant imported "33 bags Gum Indian Tragacanth." One of these bags was inspected by the customs authorities and an examiner of the Department of Agriculture, and passed as a "crude drug." Thereafter said gum was ground by defendant, and after such grinding a skilled chemist made an analysis thereof and reported that said ground tragacanth complied with the said Pharmacopœia's requirements. Thereafter defendant received a pretended order from a firm in Norfolk, Virginia, asking among other things for five pounds tragacanth gum and ten pounds senna leaves—this order was really given by an employee of the Department of Agriculture. Defendant sent, *inter alia*, both the tragacanth gum and senna leaves, filling the order for tragacanth with its second quality described as "tragacanth gum No. 1 U. S. P. Powder." That at or just before the time of this sale certain [4] employees of the Department of Agriculture had publicly claimed in writing that gum tragacanth from India was not real tragacanth, but of this fact no public notice had been given, nor was defendant aware of it at the time of shipment.

Defendant had long sold and catalogued several varieties of senna, described as "Whole leaf U. S. P.," "Half leaf," and "Broken." Defendant received an order from a firm of San Francisco, California, for one bale of senna "U. S. P. Broken Powder,"—and for two bales "Senna Alex. U. S. P. Broken." Defendant filled this order partially, by shipping two bales of senna, broken, which had been passed by the customs and agricultural authorities of the United States. Said order so received from California was not a genuine order, but one given at the instigation of the United States Department of Agriculture. Senna in the leaf is not used for medical purposes, but by soaking and filtration is made into extract, so that the broken leaf is as effective as the whole leaf.

The information consists of four counts:

(1) Shipping in interstate commerce adulterated gum tragacanth, in that it differs from the standard of strength, quality and purity laid down in the United States Pharmacopœia;

(2) Shipping in interstate commerce misbranded gum tragacanth, in that the article was labeled with the false and misleading statement that it was tragacanth of the standard prescribed by said Pharmacopœia, whereas it was not gum tragacanth, but Indian gum, and not of the standard prescribed as aforesaid;

(3) Shipping in interstate commerce adulterated senna, not of the strength, quality and purity prescribed by the United States Pharmacopœia, in that it contained stalks, stones, seeds, pebbles and other substances foreign to senna leaves;

(4) Shipping in interstate commerce misbranded senna, in that its label represented the article to consist entirely of senna leaves of the standard prescribed by said Pharmacopœia, whereas it in fact consisted of a mixture of said leaves with stalks, seeds, etc., etc.

MEMORANDUM.

It is suggested that so extraordinary are the prosecutions or proceedings brought under the pure food law, that some new procedure should be brought out in respect to them—apparently for the purpose of preventing a trial occurring on the criminal side of the court until after the facts have been looked into by the court itself.

This is a startling innovation, and so far as I am concerned might be disposed of by expressing my unwillingness to attempt such new procedure, and my belief that juries are far more apt to be extremely tender of defendants and their rights, real or pretended, than any judge could be.

But it is perhaps advisable to indicate, even at some length, the view that no such method of judging facts is permitted by the criminal law.

It is the invariable practice in this district to prosecute under the pure food law by criminal information—that is, the Government alleges a misdemeanor.

It is not open to doubt that Congress has created several possible misdemeanors by the passage of the act in question. Procedure by criminal informa- [5] tion is common law practice, and being a matter of practice it needs no statute to support it. Originally it was a

concurrent remedy with indictments for all misdemeanors except misprision of treason. In practice, even before the Independence of the United States, leave to file information was seldom sought by the Attorney General except at the instance of a high officer of Government.

Informations under the pure food law are perfect representatives of this ancient practice being brought by the district attorney under leave of court at the instance of the Department of Agriculture.

In the United States the function of an information is limited, however, by the constitutional provision that no one shall be held to answer for a "capital or otherwise infamous crime," except on presentment by the grand jury. (On this subject generally See 2 Hawk, P. C., Cap. 26, Sec. 3, p. 326 et seq.; United States v. Waller, 1 Sawyer, 701; Ex parte Wilson, 114 U. S., at 425; United States v. De Walt, 128 U. S., 393.)

An information, therefore, being no novelty, it does not become one by being applied to a new misdemeanor. The course of trial is and must remain that of an indictment. It is therefore necessary to inquire what pleas are possible either to an indictment or information, there being no such thing known as an answer in criminal law in the sense in which that word is used on the civil side. All possible pleas on the criminal side of this court must be either in abatement, in bar, or the general issue.

A motion to quash is not a pleading and therefore is not included, and jurisdictional pleas, which are sometimes given as a separate class, are really either in abatement or bar according to whether the objection is to a particular court or to courts in general. Tested by these rules this defendant has—

1st. Pleaded the general issue, which is of course proper and sufficient;

2nd. The statute of limitations is raised by special plea, which is permissible but not necessary; United States v. Brown, 2 Lowell, 267;

3d. A plea is tendered of *autre fois acquit*, concerning which plea the record is in the same condition as found by me in United States v. Robinson, memorandum filed January 18, 1910; and finally,

4th. The evidential matter as above digested is put into a pleading.

It may first be noted that the plea of *autre fois acquit* or *convict* should not be tendered simultaneously with the general issue. It is the rule in criminal law as it was at common law on the civil side, that defences both dilatory and preemptory if they did not go to the merits of the controversy should be pleaded first, in order that judgment (if against defendant) might be *respondeat ouster*. This practice arose after the severity which directed final judgment against defendant on overruling a plea in bar (Rex v. Taylor, 3 B & C, 502) had been modified.

This, however, being a matter of detail only, I have examined the record as if the prosecution had filed a replication to the plea of *autre fois acquit* and find by the record that the previous information failed for what the court considered defects apparent on the face thereof. Therefore it was no information, and the defendant was never in jeopardy.

Notwithstanding the informality of the fourth plea, what is sought to be raised is I think plain enough, unless this defendant shipped a

"drug" it is not guilty under this information. "Drug" is defined by the sixth section of the act, and the standard of drugs is to be ascertained from the United States Pharmacopœia by the seventh section thereof. What the Pharmacopœia says, therefore, the defendant asserts the court may take judicial cognizance of, and having done this it is found that neither leaf senna nor gum tragacanth is a drug in the sense in which the Pharmacopœia uses that word, i. e. "Substance [6] used solely for medicinal purposes and when professionally bought, sold and dispensed as such."

If such a plea as this (plainly in bar if it is anything) can be tried, it must be tried either by the court or the jury; and no matter which course of trial is adopted, it is a sure test of a good plea that the trying power can give judgment or verdict either way.

If it be regarded as a plea triable by the court only, judgment against the defendant would be *respondeat ouster*, but such judgment would be based necessarily upon the insufficiency of the facts alleged, admitting them to be true. This reduces the whole matter to an absurdity, for if the facts alleged (as I understand them) be true, the defendant is not guilty and the court has no more power to pronounce a judgment of not guilty than it has to enter one of guilty.

I think this analysis shows that the alleged plea amounts to no more than a statement of evidence intended to support the plea of not guilty; therefore it is not a plea at all.

It is ordered: That the pleas of not guilty and statute of limitations stand; that the plea of *autre fois acquit* be overruled after an inspection of the records of this court, and that the remainder and balance of the document filed and entitled "Plea and Answer" be stricken from the files as unauthorized by law.

On May 30, 1912, the case came on for trial before the court and jury. The trial was upon the third and fourth counts of the information. The first and second counts charging shipment of adulterated and misbranded gum tragacanth were nolle on the grounds that the shipment of that article was not made from the Southern District of New York but from the Eastern District of New York, and on June 27, 1912, an information was filed by the United States attorney for the Eastern District of New York, covering said shipment, in the District Court of the United States for said district, where this case is now pending. At the end of the Government's case, upon the trial of the third and fourth counts of the information charging shipment of adulterated and misbranded Alexandria senna leaves, counsel for defendant moved to dismiss the information. The motion was granted as to the third count covering the charge of adulteration of senna leaves, as more fully appears in the following opinion:

HAND, *District Judge*. This is a case under the title of June 30, 1906, an information charging the defendant with shipping in interstate commerce a bale of senna labeled "412, Alex. senna, Broken, U. S. P." The prosecution has proved the shipment of the bale and also its contents.

Now, it appears that in the shipment of senna to the United States there are several grades, first beginning with what is known as whole leaf senna, the second the three-quarter leaf, third the one-half leaf.

fourth broken leaf, fifth senna siftings, and sixth, senna dust. All of these products are prepared by a process of sifting from the gross products; it is pulled from the senna plant by Arabian natives of the African desert.

There is evidence in the case sufficient to go to the jury that the product in question was not broken senna, but senna siftings. On that question of fact it would not be my province to determine if the case were to go to the jury, [7] but the law requires me to assume upon this motion that the product was senna siftings, and that, therefore, it did not comply with the label which described it as broken senna. That, however, is not sufficient to make a case with the Food and Drugs Act.

Both sides concede that the only provision applicable to the case is the first subdivision of section 7 of that act, which reads as follows:

If when a product is sold under or by a name recognized in the United States Pharmacopœia or the National Formulary, it differs from the standard of strength, quality or purity as determined by the test laid down in the United States Pharmacopœia or National Formulary official at the time of the investigation.

If the defendant has violated the act it is in that it has shipped something which differs from the standard of strength or purity from that laid down in the United States Pharmacopœia.

Now, I think that the shipment in this case was sold under a name recognized in the U. S. Pharmacopœia because when that Pharmacopœia used the word senna it certainly included more than the whole leaf, three-quarter leaf, or one-half leaf, but also included broken senna; nor could the defendant in this case escape consequences of a violation of the act by describing senna as broken senna, especially as he uses the word U. S. P. But the statute only forbids the shipment of the article which differs in the standard of its strength or purity from what is laid down in the United States Pharmacopœia.

Turning to page 392 of that publication I find that there is no standard laid down except that senna consists of the dried leaflet of the plant and that it should be free from stalks. The only relevant clause in the Pharmacopœia is the phrase which I have just stated—senna should be free of stalks.

Now, the Government contends that the word stalks includes not only the stalk proper of the plant, but the stem on which the leaflets grow which is commonly known as the rachis, and for the purposes of this prosecution I will admit that the position of the Government is correct in that respect and that the term stalk includes the rachis. Very well, that being the fact, was there any senna ever brought into the United States which was free from stalks? The proof shows contradiction. Therefore, in considering this clause of the Pharmacopœia it is quite clear that you can not construe it literally or absolutely; indeed, the Government with some hesitation, I may say at least, makes no very strong argument to the contrary, and I must say that any such argument it seems to me, is hardly worthy of serious consideration because the Pharmacopœia is a book put in the hands of druggists all over the country, men of no great learning, for practical use, and this surely must be intended to bear upon the commercial usages of the country and to have some reference to the raw materials which the chemists actually use, else it is a merely exclusive, arbitrary and scholastic publication which it certainly is not.

Therefore, you can not consider the word as meaning it should be wholly free from stalks. What then is the standard of strength or purity which the Pharmacopœia establishes? The senna which passes commercially by the name of broken senna contains less of the stalks than that which passes under the name of senna siftings. If the Pharmacopœia had described both broken senna and senna siftings, I think I might say that that was the standard; that is, by those terms it would have reference to the commercial usage of the terms, and that if a person sold broken senna siftings for broken senna he would be not conforming to the standard prescribed by the Pharmacopœia. The question, therefore, simply resolves itself into this: Am I free to interpret this Pharmacopœia as meaning—[8] to accept the meaning of the Pharmacopœia to be that when you sell broken senna it should be free from the amount of stalk common to such senna as passes by that name in the market, and when you sell senna siftings, it must be free from more stalks than is present in that senna which passes as senna siftings. Now, I don't think in a criminal statute that I am free to expand that question in the way it is suggested. The Pharmacopœia could have made the standard of that commercial use. I don't think it has; I don't think that any one reading it could fairly be charged criminally with failure to recognize that the phrase related to commercial usage in the different grades as they are accustomed to. On that account it does not seem to me that I can say, or let the jury say, in this case, that they have been different from the standard of purity which the Pharmacopœia has established. That being true, gentlemen, I take the case from you, and direct a verdict for the defendant.

A motion by defendant to dismiss as to the fourth count, covering the charge of misbranding, was denied, whereupon the defendant introduced evidence, and thereafter the court charged the jury and the jury on May 31, 1912, returned a verdict of not guilty on the fourth count. The charge to the jury follows:

HAND, *District Judge*. In this case, as you perhaps already understood, there were two separate charges against this corporation; the first was for the adulteration of its drugs and the second is for their misbranding. The first charge I have withdrawn from your consideration and so you need not regard it when you come to deliberate. The only thing that remains for you is the charge that they misbranded their goods.

Now, the Congress of the United States in the exercise of its power to regulate interstate commerce has provided—has prescribed—certain things which you shall not do, among others that you shall not misbrand drugs that pass from one State to another. The actual words are, no person—I do not mean literally, but the actual significance of the words is, no person shall deliver for shipment from any State to another State any misbranded products. Then afterwards in the statute having made that prohibition, in order to enlighten us as to what the term misbranded means, it says that misbranded products are those whose package or label bears any statement regarding the article contained therein which shall be false or misleading in any particular, and that is all that the statute says. In this case, therefore, you will have to determine that the corporation delivered for shipment from one State to another State certain drugs; second, that

those drugs were misbranded, and in determining whether they were misbranded you will have to consider whether the package or label bore any statement which was false or misleading.

As to the first it is not disputed the defendant concedes that they sent this bale of senna in a package of burlap and matting from the State of New York to the State of California; they do say that the Government has not proved that the drugs were misbranded. How are you to determine that question? In the first place, did the package bear the statement about the senna? That is not in dispute. The package was labeled, as you will remember "412, Alex."—meaning Alexandria—"Senna, broken, U. S. P." and then said where it came from, so that this package did bear a label or a statement about the contents. Now, then, there remains the question, was that statement false or misleading in any particular? That is the issue in the case, and the issue about which all of this testimony has been taken, or at least, a large part of it—some of it was taken before I withdrew the question of adulteration.

[9] Now, gentlemen, the question of whether the statement on the label was false in any particular is to be determined by whether the meaning which it conveyed to the ordinary man when he read it was not a truthful statement of what the facts were. The fact was that this had come over under the name of senna siftings, and that it was one of the grades of the article which contained, I think, 20 per cent of stalk and rachis, together with a certain number of pebbles, and so on; you have heard the testimony and you remember what the actual character of the article was. There is no dispute about what the character was; there is no dispute but that it was legal to import it into the United States and that it was an article which could pass in commerce; there is nothing illegal or contraband about it. Now, then, did the label which the defendant used correctly state those facts, and again, in the determination of that, did the label, or, rather, in amplification of that, did the label state to an ordinary man that it was senna of that kind? In determining that question you may consider the fact that it was going to people who were familiar with the trade, that the label was intended to be read and to be understood by men who were in the drug business, and so you must consider whether within commercial meaning, as you have heard the testimony in regard to it, that the character of senna siftings was known in the trade as broken senna. If it was not, if broken senna meant something which had never been senna siftings, then the defendant was guilty of misbranding the goods. The question is of the meaning—the trade meaning, of that label or package, whether it corresponds with that character of senna siftings. Now, the testimony upon that question I don't think I need go into at any great length. The Government testimony is that of Moore and Rusby. Mr. Moore said that senna means in the trade the whole leaflet and the three-quarter senna means the whole leaflet somewhat broken, so one-half senna, and that broken senna means pieces of the broken leaf of one-sixteenth to one-quarter or one-half; that is, less than the half senna, but not with the added percentage of stalks and stems. Mr. Rusby says that he was for a long time I think the pharmacognosist, in any case employed to scrutinize the products which were purchased by a large drug house of this country, Parke, Davis & Company; that he had a large experience with the character of the different kinds of

senna and the names applied to them, and he says that the classification was whole senna, three-quarter, one-half, broken, siftings, and dust, and that this came in the next to the last classification, siftings, and was not broken. The testimony of the defendant on the other hand, is that he coined, so far as he knows, he coined the word "broken," and that he applied it to a kind of sifting, the first of the three classes of siftings, and that he used it, and the inference may be made, you may make the inference if you see fit, that it had been the general knowledge in the trade, and so did not indicate any particular grade of the siftings. There you have the conflicting testimony, and in that conflict it is your province absolutely to determine. I will leave the facts to you as they are. I may say that the intention of the defendant in the case to mislead is not a material element, and you need not find it. In this particular case you may well come to the conclusion if you determine that there was a misstatement that the defendant knew he was making a misstatement, but it is of no consequence and it is not necessary that you should reach that conclusion that it is relevant. It is enough that the package bore the statement which was misleading in form in the sense which I have tried to determine. Nor is it of any consequence whether the consignee of the goods was in fact actually misled. The parties have introduced the testimony in both ways; upon that the Government says there is testimony that Mr. Herb was misled because he expected his elixir to be more potent, and he got less [10] potency from it because of the impurities. The defendant says, on the other hand, the consignee must have gotten what he wanted, or he would have returned it. But that whole question, whether in this specific instance the consignee was misled is immaterial and of no consequence. The question is whether the package bore a statement which to the ordinary man in the trade would have meant something different from what it actually contained. If you determine that you will bring in a verdict of guilty.

Now, so far as the degree of proof is concerned, you have already sat in a number of criminal cases and you know that all the facts in the case must be proved beyond a reasonable doubt in favor of the Government, and then you can bring in such a verdict. This is just like any other criminal case in that respect. Each statement of the case must be established against the defendant beyond a reasonable doubt, and I think I have told you that the best definition which I can give you of that degree of conviction is that it would be such a degree of assurance as would make you willing to entrust affairs of great consequence as you may have upon your conclusion. If you come to such a conclusion in this case then you may bring in a verdict for the Government. If you find that you can not reach such a degree of conviction you must bring a verdict in of acquittal.

MR. HITCHINGS. I beg to except to that portion of your honor's charge in which you say if senna was not known to the trade as broken senna, and I ask your honor to charge the jury that in this case if Scott & Gilbert knew the meaning of the word broken as you are advised, that then the prosecution must fail and the defendant be found not guilty. I except to your honor's charge that the intention of the defendant in putting this label on the package was immaterial. I except to that portion of your honor's charge that it is of no consequence that the consignee was not misled, and I except to

that portion of your honor's charge that if the label would deceive an ordinary man that then the defendant was guilty of misbranding, and again I request your honor to state that the label must have deceived the consignee—must have been calculated to deceive the consignee or there cannot be a verdict for the plaintiff.

The COURT. Well, calculated to deceive the consignee; that is rather different. I will charge you, gentlemen, that the label must have been of such a character as would be calculated to deceive the consignee. That it should actually have deceived him? No.

Mr. HITCHINGS. I want your honor to charge this jury specifically that any ordinary man outside of the consignee has nothing whatever to do with it and the jury has nothing whatever to do with it.

The COURT. No, I won't charge that.

Mr. HITCHINGS. I take an exception. Will your honor call the attention of the jury, inasmuch as you have adverted in your charge to it, to the fact that he did not know anything about senna siftings. Mr. Moore, and also the fact that Ross testified that senna broken and senna siftings were the same thing?

The COURT. I have stated that.

A JUROR. Will you inform the jury what qualities of senna that word U. S. P. can be put after?

The COURT. I will charge you, gentlemen, that it could be put after the actual contents of this bale. You need not be concerned with the U. S. P. There was no misbranding in that they put U. S. P. upon the contents of this bale.

Mr. HITCHINGS. I ask your honor to charge the jury as to that, that Scott & Gilbert were not misled is some evidence that the jury may consider that the label was not misleading.

[11] The COURT. Yes, I will charge that, Gentlemen, I really intended to do it in my charge: In considering the question as to whether the meaning in the trade—to the man in the trade—that the meaning of broken senna indicated the contents of this package, you may, I think, fairly consider the fact that Scott & Gilbert received it and whatever the testimony is in his deposition. You may take the deposition if you like. I won't charge you now, because I have forgotten what he said about that; it was read and counsel differed in their recollection, and I haven't any definite recollection of what he said, but if he said he regarded it as broken senna, that would be a piece of evidence you could consider.

SAVAGE v. JONES, STATE CHEMIST OF THE STATE OF INDIANA.¹

(United States Supreme Court, June 7, 1912.)

225 U. S. 501,

Statute of the State of Indiana held valid as an inspection law, and not unconstitutional and void as being in conflict with the Food and Drugs Act, June 30, 1906, or as an unreasonable burden on interstate commerce.

Appeal from a decree of the circuit court of the United States for the District of Indiana, sustaining a demurrer to a bill in equity to restrain the defendant from enforcing the provisions of an act of the State of Indiana, as applied to complainant's product. Affirmed.

¹ Not arising under the Food and Drugs Act of June 30, 1906. See also decision of the Supreme Court in *Standard Stock Food Co. v. Wright, State Food and Dairy Commissioner of Iowa*. (225 U. S., 540.)

STATEMENT OF THE CASE.

[503] This is an appeal from a decree of the circuit court sustaining a demurrer to the bill for want of equity. The suit was brought by Marion W. Savage, a citizen of Minnesota, to restrain the defendant, the State chemist of Indiana, from taking proceedings to enforce an act of the general assembly of that State (Acts 1907, chapter 206) as applied to the sales of the complainant's product, a preparation for domestic animals known as "International Stock Food." The act is set forth in the margin.¹

[504] The bill alleges that the complainant has for many years been engaged in Minnesota in the manufacture of medicinal [505] preparations, one of which is called "International Stock Food" and is sold in every State in the Union as [506] well as in many foreign countries; that he has invested large amounts of money in building up a lucrative trade [507] in Indiana among the retail druggists, many hundreds of whom were "buying, carrying in stock and retailing to [508] the public" the complainant's preparations; that the complainant's gross annual sales in Indiana amount to many thousands of dollars; that the "International Stock Food" possesses effective curative properties for various diseases of domestic animals and is composed of medicinal roots, herbs, seeds, and barks, combined by a secret formula of great value; and that the disclosure to his competitors of the proportion of the ingredients and the manner of combination would seriously injure his business; that the commercial designation "International Stock Food" is not used by the complainant as descriptive of feed of any kind, and is not so understood by retail druggists and purchasers, but is well known to the public as a trade name of a medicine for domestic animals protected under trade-[509]marks in the United States; that on investigations made by the United States internal revenue department it was determined that the preparation was not feeding stuff nor a condimental stock food, but was a proprietary or patent medicine within the meaning of the revenue laws of 1863 and 1898; and that subsequent to the enactment by Congress of the Food and Drugs Act of 1906 (June 30, 1906, 34 Stat. 768, c. 3915), the administrative officers of the United States Government duly determined that it was a medicine and not a food within the meaning of that act.

The bill then avers the passage of the act above mentioned by the legislature of Indiana and sets forth the provisions of sections 1, 2, 8, 9, and 11. It is alleged that the defendant, the State chemist of Indiana, is asserting that the complainant's manufacture is one of the concentrated commercial feeding stuffs covered by the act, and that it is the duty of the complainant to comply with its provisions with reference to its sale in Indiana, "and has stated and declared to your orator, and now threatens that unless your orator has attached in a conspicuous place on the outside of each package of your orator's said medicinal preparation offered for sale within the State of Indiana, a printed statement, clear and truthful, certifying among other things the name of the manufacturer and shipper, the place of manufacture, the place of business and chemical analysis stating the percentage of crude protein, crude fat and crude fiber contained

¹ Text of act omitted.

in said preparation and have all its constituents determined by the methods adopted by the session [association?] of official agricultural chemists, and shall also state upon said package the names of each ingredient of which said preparation is composed, he will cause the arrest and prosecution of every person dealing or trading in the medicinal preparation of your orator within the State of Indiana." That the defendant has sent, or caused to be sent, broadcast [510] throughout the State of Indiana to dealers and others who are customers, directly or indirectly, of complainant many thousand circular letters warning them against the sale of said preparation and threatening that prosecution will be instituted against all persons engaged in the sale thereof, unless and until the complainant shall have complied with the provisions of said act.

It is also alleged that the sales made by the complainant "in the State of Indiana are made at the city of Minneapolis, State of Minnesota, to be delivered free on board of cars at Minneapolis, Minnesota, and delivered to purchasers and consumers within the State of Indiana in the original unbroken packages, freight being paid thereon by the consumers and purchasers." That unless restrained the defendant will continue to annoy and intimidate the numerous persons engaged in selling the preparation in Indiana, by threats of criminal prosecution, and will report to the various prosecuting attorneys of the State the sales that may come to his notice and instigate prosecutions of the sellers as violators of the statute, thereby obstructing the complainant in the conduct of his business in the State of Indiana and interfering with his property rights to his irreparable injury, for which there is no adequate legal remedy. That many hundreds of persons engaged in selling the preparation have already discontinued their purchases and sales because of the fear of criminal prosecution induced by the defendant's threats, and that large numbers of those who are still handling it will be induced by such threats to discontinue its sale.

The bill further avers that the complainant's preparation is not in any sense either concentrated commercial feeding stuff, or condimental stock feed, or a patent proprietary stock feed within the proper construction of the act of Indiana, and is not advertised as possessing nutritive properties or used except as medicine; that the complainant does not "claim that said medicinal preparation contains [511] any crude protein or crude fat;" that it does not contain, nor is it claimed on behalf of the defendant that it contains, any ingredient that is deleterious or injurious to animal life or health; that it is prescribed and administered in small doses as medicine and "that the only nutritive substance or ingredients * * * are employed as diluents in so small an amount as to produce no feeding effect whatever, but for the sole purpose of rendering medicinal bitter roots, herbs, barks and seeds more acceptable to the animal stomach;" that directions for use accompany each package and in every case there is a statement plainly showing that the preparation is to be used to cure disease and not in place of or as a substitute for any grain or feed. That nevertheless, the defendant, who in his official capacity is charged by law with the enforcement of the statute, has construed it to apply to complainant's product.

That under section 3 of the statute of Indiana the State chemist is to register the facts set forth in the certificate required by section

1 as a permanent record and to furnish stamps or labels, showing such registration, to manufacturers or agents desiring to sell the concentrated commercial feeding stuff so registered in amounts not less than the value of five dollars or multiples of five dollars for any one such product; that by section 5 the State chemist is to receive one dollar for each one hundred stamps, and that the proceeds thus derived are to be paid into the treasury of the Indiana Agricultural Experiment Station to be expended in carrying out the provisions of the statute and for any other expenses of such station as authorized by law.

That the statute, and particularly sections 1, 2, 7, 8 and 9, are repugnant to the Fourteenth Amendment of the Constitution of the United States in that they require manufacturers of proprietary stock feed and condimental feeds, arbitrarily, without compensation and without due process of law, whether such preparation contain any poisonous or deleterious element or ingredient, to disclose the formulæ by which they are compounded, and the ingredients and proportions thereof, which embody valuable trade secrets; and that if the act is enforced against the complainant he will be deprived of his property contrary to the said amendment.

That the statute also violates section 8 of Article I of the Constitution of the United States as an unreasonable interference with interstate commerce in which the complainant is engaged.

That further, the statute is invalid under section 19 of Article IV of the constitution of the State of Indiana in that the title does not express the requirement that manufacturers or dealers shall disclose the formulæ by which their products are manufactured or the ingredients or proportions.

That for many years the complainant's preparation has been offered for sale in packages of different sizes, holding respectively 24 ounces, 3 pounds, 6 pounds, and 25 pounds; that under the terms of the statute the complainant would be required to pay the same amount of tax for a package of 24 ounces that other commodities and manufacturers thereof pay for a package of one hundred pounds; and that this discrimination is unreasonable and unconstitutional.

That the enforcement of the requirement as to the affixing of stamps and payment therefor is a tax upon the complainant's property and business, and is not a license fee determined by any reasonable requirement, or for the purpose of carrying out the inspection required, but, on the contrary, under the guise of a police regulation constitutes a measure for raising revenue for the general work and expense of the Indiana Agricultural Experiment Station. That the act is contrary to section 10 of Article I of the Constitution of the United States, that no State shall without the consent of Congress lay any imposts or duties on imports, [513] except what may be absolutely necessary for executing its inspection law.

The bill prays that the defendant may be enjoined from taking any action against the complainant, interfering with his right to vend and convey his preparations in the State of Indiana, from instituting any proceedings to punish him for failure to comply with the defendant's demands, from giving out orally or in writing to the various prosecuting officers of the State, or to any other agents thereof charged with the enforcement of its law, or to the public, any threats of prosecution or information upon which prosecutions are

requested, or may be based, and from otherwise seeking to prevent the conduct of the complainant's business in the State or to discredit the reputation of his remedy.

The defendant demurred to the bill upon the ground that it was wholly without equity, and that the court was without jurisdiction. Upon the former ground the bill was dismissed.

[519] OPINION OF THE COURT.

Mr. Justice HUGHES, after making the above statement, delivered the opinion of the court.

The principal contention, in support of this appeal is that the statute of Indiana (Acts 1907, chapter 206), the provisions of which have been set forth, is an unconstitutional interference with the complainant's right to engage in interstate commerce.

A preliminary question arises with respect to the jurisdiction of this court, by reason of the allegation of the bill that the complainant's product is not a "concentrated commercial feeding stuff" within the true meaning of the act, and that so interpreted the statute would not apply. But it was also alleged that the State chemist, who was authorized to enforce the statute, had construed it to be applicable to the commodity, which is commercially known as "International Stock Food;" and thus charged by the officer with the duty of obedience, the complainant in his bill challenged the constitutionality of the legislation. The grounds for the attack were not found in the conclusions reached by the officer, as to the nature of the article, in administering an act otherwise conceded to be valid (*Arbuckle v. Blackburn*, 191 U. S. 405, 414), but in the provisions of the statute itself as applied to the articles within its purview while in the course of interstate commerce. A general demurrer, for want of equity, was sustained, and in view of the substantial character of the contention the case must be regarded as one in which the law of a State is claimed to be in contravention of the Constitution of the United States. Act of March 3, 1891, 26 Stat. 826, c. 517, sec. 5; *Penn Mutual Life Insurance Co. v. Austin*, 168 U. S. 685, 694; *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 478; *Lampasas v. Bell*, 180 U. S. 276, 282.

It is said that the complainant is not entitled to invoke the constitutional protection, in that he fails to show [520] injury. *Southern Railway Co. v. King*, 217 U. S. 524, 534. The argument rests upon the averment in the bill that his sales were made at Minneapolis, the goods "to be delivered free on board of cars" at that point, "and delivered to purchasers and consumers within the State of Indiana in the original unbroken packages, freight being paid thereon by the consumers and purchasers." In answer, it must again be said that "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." *Swift & Co. v. United States*, 196 U. S. 375, 398; *Rearick v. Pennsylvania*, 203 U. S. 507, 512. It clearly appears from the bill that the complainant was engaged in dealing with purchasers in another State. His product manufactured in Minnesota was, in pursuance of his contracts of sale, to be delivered to carriers for transportation to the purchasers in Indiana. This was interstate commerce, in the freedom of which

from any unconstitutional burden the complainant had a direct interest. The protection accorded to this commerce by the Federal Constitution extended to the sale by the receiver of the goods in the original packages. *Leisy v. Hardin*, 135 U. S. 100; *In re Rahrer*, 140 U. S. 545, 559, 560; *Plumley v. Massachusetts*, 155 U. S. 461, 473; *Vance v. Vandercook Co.* (No. 1), 170 U. S. 438, 444, 445; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 22-25; *Heyman v. Southern Railway Co.*, 203 U. S. 270, 276. An attack upon this right of the importing purchasers to sell in the original packages bought from the complainant, not only would be to their prejudice, but inevitably would inflict injury upon the complainant by reducing his interstate sales, a result to be avoided only through his compliance with the act by filing the statement and affixing to his goods the labels it required. According to the bill, the State chemist had threatened the complainant that in default of such compliance he would cause the arrest and prosecution of every person dealing in the [521] article within the State and had distributed broadcast throughout the State warning circulars. If the statute of Indiana, as applied to sales by importing purchasers in the original packages, constitutes an unwarrantable interference with interstate commerce in the complainant's product, he had standing to complain, and was entitled to relief against enforcement by the defendant of the illegal demands. *Scott v. Donald*, 165 U. S. 107, 112; *Ex parte Young*, 209 U. S. 123, 159, 160; *Ludwig v. Western Union Telegraph Co.*, 216 U. S. 146; *Hopkins v. Clemson College*, 221 U. S. 636, 643-645; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 620, 621.

We are thus brought to the examination of the statute. The question of its constitutional validity may be considered in two aspects, (1) independently of the operation and effect of the act of Congress of June 30, 1906, c. 3915 (34 Stat. 768), known as "The Food and Drugs Act," and (2) in the light of this Federal enactment.

First. The statute relates to the sale of various sorts of food, for domestic animals, embraced in the term "concentrated commercial feeding stuff" as defined in the act. It requires the filing of a statement and a sworn certificate, the affixing of a label bearing certain information, and a stamp.

By section 1 it is provided, in substance, that before any such feeding stuff is sold, or offered for sale, in Indiana, "the manufacturer, importer, dealer, agent or person," selling or offering it, shall file with the State chemist a statement that he desires to sell the feeding stuff, and also a sworn certificate, for registration, stating (a) the name of the manufacturer, (b) the location of the principal office of the manufacturer, (c) the name, brand or trade-mark under which the article will be sold, (d) the ingredients from which it is compounded, and (e) the minimum percentage of crude fat and crude protein, allowing one per cent of nitrogen to equal six and twenty-five hundredths [522] per cent of protein, and the maximum percentage of crude fiber which the manufacturer or person offering the article for sale guarantees it to contain; these constituents to be determined by the methods recommended by the association of official agricultural chemists of the United States. The State chemist is to register the facts set forth in the certificate in a permanent record (sec. 3).

Section 2 provides that there shall be affixed to every package or sample of the article a tag or label which shall be accepted as a guarantee of the manufacturer, importer, dealer or agent and shall have plainly printed thereon (a) the number of net pounds of feeding stuff in the package, (b) the name, brand or trade-mark under which it is sold, (c) the name of the manufacturer, (d) the location of the principal office of the manufacturer, and (e) the guaranteed analysis stating the minimum percentage of crude fat and crude protein determined as described in section 1, and the ingredients from which the article is compounded.

A stamp purchased from the State chemist, showing that the article has been registered and that the inspection tax has been paid, is to be affixed for each one hundred pounds or fraction thereof, special provision being made for the delivery of an equivalent number of stamps on sale in bulk. By an amendment of 1909, stamps are to be issued by the State chemist to cover twenty-five, fifty and one hundred pounds (Acts 1909, chapter 46, p. 106). He is not required to sell stamps in less amount than to the value of five dollars, or multiples thereof, for any one feeding stuff, or to register any certificate unless accompanied by an order and fees for stamps to the amount of five dollars, or some multiple of that sum (sec. 3). Sworn statements are to be filed annually of the number of net pounds of each brand of feeding stuff sold or offered for sale in the State (sec. 4).

The price of the stamps under the original act was one [523] dollar per hundred; but by the amendment of 1909 (*supra*) the charge was made eighty cents per hundred, for stamps to cover one hundred pounds, and forty cents and twenty cents respectively for stamps to cover fifty and twenty-five pounds. The fees received are to be paid into the treasury of the Indiana Agricultural Experiment Station and expended "in meeting all necessary expenses in carrying out the provisions of this act, including the employment of inspectors, chemists, expenses in procuring samples, printing bulletins giving the results of the work of feeding stuff inspection, as provided for by this act, and for any other expenses of said Indiana agricultural experiment station, as authorized by law." A classified report of the receipts and expenditures is to be made to the Governor of the State annually (sec. 5).

Any one selling, or offering for sale, any feeding stuff which has not been registered, and labeled and stamped as required by the act, or which is found by an analysis made by the State chemist or under his direction to contain "a smaller percentage of crude fat or crude protein than the minimum guarantee," or is "labeled with a false or inaccurate guarantee," and any one who adulterates any feeding stuff "with foreign mineral matter or other foreign substance, such as rice hulls, chaff, mill sweepings," etc., "or other materials of less or of little or no feeding value without plainly stating on the label hereinbefore described, the kind and amount of such mixture," or who adulterates with any substance injurious to the health of domestic animals, or alters the State chemist's stamp, or uses it a second time, or fails to make the sworn statement as to annual sales as required, is guilty of a misdemeanor and is subject to fine (sec. 6).

The State chemist and his deputies are empowered to procure from any lot or package of the described feeding stuffs offered for sale or found in Indiana a quantity not exceeding two pounds, to be drawn during reasonable [524] business hours, or in the presence of the owner or his representatives (sec. 7), and it is made a misdemeanor to interfere with such inspection and sampling (sec. 8). He is also authorized to prescribe and enforce regulations as he may deem necessary to carry the act into effect; and he may refuse "the registration of any feeding stuff under a name which would be misleading as to the materials of which it is made, or when the percentage of crude fiber is above or the percentage of crude fat or crude protein below the standards adopted for concentrated commercial feeding stuffs."

The evident purpose of the statute is to prevent fraud and imposition in the sale of food for domestic animals, a matter of great importance to the people of the State. Its requirements were directed to that end, and they were not unreasonable. It was not aimed at interstate commerce, but without discrimination sought to promote fair dealing in the described articles of food. The practice of selling feeding stuffs under general descriptions gave opportunity for abuses which the legislature of Indiana determined to correct, and to safeguard against deception it required a disclosure of the ingredients contained in the composition. The bill complains of the injury to manufacturers if they are forced to reveal their secret formulas and processes. We need not here express an opinion upon this question, in the breadth suggested, as the statute does not compel a disclosure of formulas or manner of combination. It does demand a statement of the ingredients, and also of the minimum percentage of crude fat and crude protein and of the maximum percentage of crude fiber, a requirement of obvious propriety in connection with substances purveyed as feeding stuffs.

The State can not, under cover of exerting its police powers, undertake what amounts essentially to a regulation of interstate commerce, or impose a direct burden upon that commerce. *Railroad Co. v. Husen*, 95 U. S. [525] 465, 475; *Walling v. Michigan*, 116 U. S. 446; *Bowman v. Chicago &c. Ry. Co.*, 125 U. S. 465; *Leisy v. Hardin*, 135 U. S. 100; *Minnesota v. Barber*, 136 U. S. 313; *Brimmer v. Rebman*, 138 U. S. 78; *Scott v. Donald*, 165 U. S. 58; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 13; *Houston & Texas Central R. R. Co. v. Mayes*, 201 U. S. 321; *Atlantic Coast Line v. Wharton*, 207 U. S. 328; *Adams Express Co. v. Kennedy*, 214 U. S. 218. But when the local police regulation has real relation to the suitable protection of the people of the State, and is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislation enacted by Congress pursuant to its constitutional authority. *Plumley v. Massachusetts*, 155 U. S. 461; *Hennington v. Georgia*, 163 U. S. 299, 317; *N. Y., N. H. & H. Ry. Co. v. New York*, 165 U. S. 628; *Chicago, M. & St. P. Ry. Co. v. Solan*, 169 U. S. 133; *Missouri, Kansas & Texas Ry. Co. v. Haber*, 169 U. S. 613; *Patapsco Guano Co. v. North Carolina*, 171 U. S. 345; *Reid v. Colorado*, 187 U. S. 137; *Pennsylvania R. R. Co. v. Hughes*, 191 U. S. 477; *Crossman v. Lurman*, 192 U. S. 189; *McLean*

v. Denver & Rio Grande R. R. Co., 203 U. S. 38, 50; *Asbell v. Kansas*, 209 U. S. 251, 254-256; *Chicago, R. I. & P. Ry. Co. v. Arkansas*, 219 U. S. 453.

In *Plumley v. Massachusetts*, a law of that Commonwealth was sustained which had been passed "to prevent deception in the manufacture and sale of imitation butter." The article, for the sale of which the plaintiff in error was convicted in the State court, had been received by him from the manufacturers in Illinois, as their agent, and had been sold in Massachusetts in the original package. The court said (*supra*, pp. 468, 472), referring to the purpose and effect of the statute:

He is only forbidden to practise, in such matters, a fraud upon the general public. The statute seeks to suppress false pretenses and to promote fair dealing in the sale of an article of food. It [526] compels the sale of oleomargarine for what it really is, by preventing its sale for what it is not. Can it be that the Constitution of the United States secures to any one the privilege of manufacturing and selling an article of food in such manner as to induce the mass of people to believe that they are buying something which, in fact, is wholly different from that which is offered for sale? Does the freedom of commerce among the States demand a recognition of the right to practice a deception upon the public in the sale of any articles, even those that may have become the subject of trade in different parts of the country? * * * Such legislation may, indeed, indirectly or incidentally affect trade in such products transported from one State to another State. But that circumstance does not show that laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the States.

In *Patapsco Guano Co. v. North Carolina*, *supra*, the court had before it a statute of North Carolina relating to fertilizing materials. It provided:

Every bag, barrel or other package of such fertilizers or fertilizing materials as above designated offered for sale in this State shall have thereon plainly printed a label or stamp, a copy of which shall be filed with the Commissioner of Agriculture, together with a true and faithful sample of the fertilizer or fertilizing material which it is proposed to sell, * * * and the said label or stamp shall truly set forth the name, location and trade-mark of the manufacturer; also the chemical composition of the contents of such package, and the real percentage of any of the following ingredients asserted to be present, to wit, soluble and precipitated phosphoric acid, which shall not be less than eight per cent; soluble potassa, which shall not be less than one per cent; ammonia, which shall not be less than two per cent, or its equivalent in nitrogen; together with the date of its analyzation, and that the requirements of the law have [527] been complied with; and any such fertilizer as shall be ascertained by analysis not to contain the ingredients and percentage set forth as above provided shall be liable to seizure and condemnation.

A charge of twenty-five cents per ton on such materials was laid for the purpose of defraying the expenses connected with the inspection; and the department of agriculture was authorized to establish an experiment station and to employ an analyst, whose duty it was to analyze such fertilizers and products as might be required by the department and to aid so far as practicable in suppressing fraud in their sale.

The court upheld the statute, saying (*supra*, p. 357):

Whenever inspection laws act on the subject before it becomes an article of commerce they are confessedly valid, and also when, although operating on articles brought from one State into another, they provide for inspection in the exercise of that power of self-protection commonly called the police power.

After referring to the decision in *Plumley v. Massachusetts*, *supra*, the court continued (pp. 358, 361) :

Where the subject is of wide importance to the community, the consequences of fraudulent practices generally injurious, and the suppression of such frauds matter of public concern, it is within the protective power of the State to intervene. Laws providing for the inspection and grading of flour, the inspection and regulation of weights and measures, the weighing of coal on public scales, and the like, are all competent exercises of that power, and it is not perceived why the prevention of deception in the adulteration of fertilizers does not fall within its scope. * * * The act of January 21, 1891, must be regarded, then, as an act providing for the inspection of fertilizers and fertilizing materials in order to prevent the practice of imposition on the people of the State, and the charge of twenty-five cents per ton as intended merely to defray the cost of such inspection. It being competent for the State to pass laws of this character, does the [528] requirement of inspection and payment of its cost bring the act into collision with the commercial power vested in Congress? Clearly this cannot be so as to foreign commerce, for clause two of section ten of article one expressly recognizes the validity of State inspection laws, and allows the collection of the amounts necessary for their execution; and we think the same principle must apply to interstate commerce. In any view, the effect on that commerce is indirect and incidental, and "the Constitution of the United States does not secure to any one the privilege of defrauding the public."

It can not be doubted that, within the principle of these decisions, and of the others above cited, the State of Indiana—assuming for the present that there was no conflict with Federal legislation—was entitled, in the exercise of its police power, to require the disclosure of the ingredients contained in the feeding stuffs offered for sale in the State, and to provide for their inspection and analysis. The provisions for the filing of a certificate, for registration and for labels, were merely incidental to these requirements and were appropriate means for accomplishing the legitimate purpose of the act. It is said that the statute permits the State, through its officials, to set up arbitrary standards governing conditions of manufacture. But it does not appear that any arbitrary standard has been set up, or that there has been any attempt to enforce one against the complainant. (See *Western Union Telegraph Co. v. Richmond*, 224 U. S. 160, 168.) The complainant has declined to file the statement and to affix the labels containing the disclosure of ingredients for which the statute provides, and instead he resorts to this suit.

The contention is made that the statute is a disguised revenue measure, but on a review of its provisions we find no warrant for such a characterization of it. The bill sets forth no facts whatever to show that the charge for stamps is unreasonable in its relation to the cost of [529] inspection, and certainly it can not be said that aught appears "to justify the imputation of bad faith and change the character of the act." *Patapsco Guano Co. v. North Carolina*, *supra*; *McLean v. Denver & Rio Grande R. R. Co.* *supra*; *Red "C" Oil Co. v. North Carolina*, 222 U. S. 380, 393. With respect to the requirement of an advance payment for stamps, to the value of five dollars, to accompany the certificate, we need not say more than that the complainant is plainly not prejudiced, in view of the alleged extent of his sales.

Second. The question remains whether the statute of Indiana is in conflict with the act of Congress known as the Food and Drugs Act of June 30, 1906 (34 Stat. 768, c. 3915). For the former, so far

as it affects interstate commerce even indirectly and incidentally, can have no validity if repugnant to the Federal regulation. *Reid v. Colorado*, 187 U. S. 137, 146, 147; *Asbell v. Kansas*, 209 U. S. 251, 256, 257; *Northern Pacific Ry. Co. v. Washington*, 222 U. S. 370, 378; *Southern Ry. Co. v. Reid*, 222 U. S. 424, 436.

The object of the Food and Drugs Act is to prevent adulteration and misbranding, as therein defined. It prohibits the introduction into any State from any other State "of any article of food or drugs which is adulterated or misbranded, within the meaning of this act." The purpose is to keep such articles "out of the channels of interstate commerce, or, if they enter such commerce, to condemn them while being transported or when they have reached their destinations, provided they remain unloaded, unsold or in original unbroken packages." *Hipolite Egg Co. v. United States*, 220 U. S. 45, 54. To determine the scope of the act with respect to feeding stuffs we must examine its definitions of the adulteration and misbranding of food, the term "food" including "all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed or com[530]pound" (sec. 6). These definitions are found in sections 7 and 8, which are set forth in the margin.¹

[531] It will be observed that in its enumeration of the acts, which constitute a violation of the statute, Congress has not included the failure to disclose the ingredients of the article, save in specific instances where, for example, morphine, opium, cocaine, or other substances particularly mentioned, are present. It is provided that the article "for the purposes of this act" shall be deemed to be misbranded if the package or label bear any statement [532], design or device regarding it or the ingredients or substances it contains, which shall be false or misleading (sec. 8). But this does not cover the entire ground. It is one thing to make a false or misleading statement regarding the article or its ingredients, and it may be quite another to give no information as to what the ingredients are. As is well known, products may be sold, and in case of so-called proprietary articles frequently are sold, under trade names which do not reveal the ingredients of the composition and the proprietors refrain from revealing them. Moreover, in defining what shall be adulteration or misbranding for the purposes of the Federal act, it is provided that mixtures or compounds known as articles of food under their own distinctive names, not taking or imitating the distinctive name of another article, which do not contain "any added poisonous or deleterious ingredients" shall not be deemed to be adulterated or misbranded if the name be accompanied on the same label or brand with a statement of the place of manufacture (sec. 8).

Congress has thus limited the scope of its prohibitions. It has not included that at which the Indiana statute aims. Can it be said that Congress, nevertheless, has denied to the State, with respect to the feeding stuffs coming from another State and sold in the original packages, the power the State otherwise would have to prevent imposition upon the public by making a reasonable and non-discriminatory provision for the disclosure of ingredients, and for inspection and analysis? If there be such denial it is not to be found in any express declaration to that effect. Undoubtedly Con-

¹ Omitted.

gress, by virtue of its paramount authority over interstate commerce, might have said that such goods should be free from the incidental effect of a State law enacted for these purposes. But it did not so declare. There is a proviso in the section defining misbranding for the purposes of the act that "nothing in this act shall be construed" as requiring manufacturers of [533] proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas "except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding" (sec. 8). We have already noted the limitations of the provisions referred to. And it is clear that this proviso merely relates to the interpretation of the requirements of the act, and does not enlarge its purview or establish a rule as to matters which lie outside its prohibitions.

Is, then, a denial to the State of the exercise of its power for the purposes in question necessarily implied in the Federal statute? For when the question is whether a Federal act overrides a State law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act can not otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the State law must yield to the regulation of Congress within the sphere of its delegated power. *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426; *Northern Pacific Ry. Co. v. Washington*, *supra*; *Southern Ry. Co. v. Reid*, *supra*.

But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State. This principle has had abundant illustration. *Chicago &c. Ry. Co. v. Solan*, 169 U. S. 133; *Missouri, Kansas & Texas Ry. Co. v. Haber*, 169 U. S. 613; *Reid v. Colorado*, 187 U. S. 137; *Pennsylvania R. R. Co. v. Hughes*, 191 U. S. 477; *Crossman v. Lurman*, 192 U. S. 189; *Asbell v. Kansas*, 209 U. S. 251; *Northern Pacific Ry. Co. v. Washington*, 222 [534] U. S. 370, 379; *Southern Ry. Co. v. Reid*, 222 U. S. 424, 442.

In *Missouri, Kansas & Texas Ry. Co. v. Haber*, *supra*, the Supreme Court of Kansas had affirmed a judgment against the railway company for damages caused by its having brought into the State certain cattle alleged to have been affected with Texas fever which was communicated to the cattle of the plaintiff. The recovery was based upon a statute of Kansas which made actionable the driving or transporting into the State of cattle which were liable to communicate the fever. It was contended that the act of Congress of May 29, 1884, c. 60 (23 Stat. 31), known as the animal industry act, together with the act of March 3, 1891, c. 544 (26 Stat. 1044), appropriating money to carry out its provisions, and section 5258 of the Revised Statutes, covered substantially the whole subject of the transportation from one State to another State of live stock capable of imparting contagious disease, and therefore that the State of Kansas had no authority to deal in any form with that subject. The act of 1884 provided for the establishment of a bureau of animal industry, for

the appointment of a staff to investigate the condition of domestic animals and for report upon the means to be adopted to guard against the spread of disease. Regulations were to be prepared by the Commissioner of Agriculture and certified to the executive authority of each State and Territory. Special investigation was to be made for the protection of foreign commerce and the Secretary of the Treasury was to establish such regulations as might be required concerning exportation. It was provided that no railroad company within the United States, nor the owners or masters of any vessel should receive for transportation, or transport, from one State to another any live stock affected with any communicable disease, nor should any one deliver for such transportation, or drive on foot or transport in private conveyance from [535] one State to another any live stock knowing them to be so affected. It was made the duty of the Commissioner of Agriculture to notify the proper officials or agents of transportation companies doing business in any infected locality of the existence of contagion; and the operators of railroads, or the owners or custodians of live stock within such infected district, who should knowingly violate the provisions of the act were to be guilty of a misdemeanor punishable by fine or imprisonment.

The court held that this Federal legislation did not override the statute of the State; that the latter created a civil liability as to which the animal industry act of Congress had not made provision. The court said (*supra*, pp. 623, 624):

May not these statutory provisions stand without obstructing or embarrassing the execution of the act of Congress? This question must of course be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the State is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together. *Sinnot v. Davenport*, 22 How. 227, 243. * * * Whether a corporation transporting, or the person causing to be transported from one State to another cattle of the class specified in the Kansas statute, should be liable in a civil action for any damages sustained by the owners of domestic cattle by reason of the introduction into their State of such diseased cattle, is a subject about which the animal industry act did not make any provision. That act does not declare that the regulations established by the Department of Agriculture should have the effect to exempt from civil liability one who, but for such regulations, would have been liable either under the general principles of law or under some State enactment for damages arising [536] out of the introduction into that State of cattle so affected. And, as will be seen from the regulations prescribed by the Secretary of Agriculture, that officer did not assume to give protection to any one against such liability.

In *Reid v. Colorado*, *supra*, the question arose under a statute of Colorado which had been passed to prevent the introduction into the State of diseased animals. The statute made it a misdemeanor for any one to bring into the State between April 1 and November 1 any cattle or horses from a State, Territory or county south of the 36th parallel of north latitude, unless they had been held at some place north of that parallel at least ninety days prior to importation, or unless the owner or person in charge should procure from the State Veterinary Sanitary Board a certificate, or bill of health, to the effect that the cattle or horses were free from all infectious or contagious diseases and had not been exposed thereto at any time within the preceding ninety days. The expense of any inspection in connection therewith was to be paid by the owner.

The plaintiff in error had been convicted of bringing cattle into the State in violation of the statute. There was no proof in the case that the particular cattle had any infectious or contagious disease, but it did appear that they were brought from Texas, south of the 36th parallel, without being held or inspected as the statute required. Its provisions were ignored altogether as invalid legislation. When the plaintiff in error refused assent to the State inspection he showed to the authorities a certificate signed by an assistant inspector of the Federal Bureau of Animal Industry who certified that he had carefully inspected the cattle in Texas and found them free from communicable disease. It was insisted that the statute of Colorado was in conflict with the animal industry act of Congress, but the court sustained the State law for the [537] reason that, although the two statutes related to the same general subject, they did not cover the same ground and were not inconsistent with each other.

The court thus emphasized the general principle involved (*supra*, p. 148) :

It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that “in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.”

And in the course of its review of the subjects embraced in the Federal legislation the court said (pp. 149, 150) :

Still another subject covered by the act is the driving on foot or transporting from one State or Territory into another State or Territory, or from any State into the District of Columbia, or from the District into any State, of any live stock *known* to be affected with any contagious, infectious or communicable disease. But this provision does not cover the entire subject of the transporting or shipping of diseased live stock from one State to another. The owner of such stock, when bringing them into another State, may not know them to be diseased; but they may, in fact, be diseased, or the circumstances may be such as fairly to authorize the State into which they are about to be brought to take such precautionary measures as will reasonably guard its own domestic animals against danger from contagious, infectious or communicable diseases. The act of Congress left the State free to cover that field by such regulations as it deemed appropriate, and which only incidentally affected the freedom of interstate commerce. Congress went no farther than to make it an [538] offense against the United States for any one *knowingly* to take or send from one State or Territory to another State or Territory, or into the District of Columbia, or from the District into any State, live stock affected with infectious or communicable disease.

The animal industry act did not make it an offense against the United States to send from one State into another live stock which the shipper did not know were diseased. The offense charged upon the defendant in the State court was not the introduction into Colorado of cattle that he knew to be diseased. He was charged with having brought his cattle into Colorado from certain counties in Texas, south of the 36th parallel of north latitude, without said cattle having been held at some place north of said parallel of latitude for at least the time required prior to their being brought into Colorado, and without having procured from the State Veterinary Sanitary Board a certificate or bill of health to the effect that his cattle—in fact—were free from all infectious or contagious diseases, and had not been exposed at any time within ninety days prior thereto to any such diseases, but had declined to procure such certificate or have the inspection required by the statute. His knowledge as to the actual condition of the cattle was of no consequence under the State enactment or under the charge made.

Our conclusion is that the statute of Colorado as here involved does not cover the same ground as the act of Congress and therefore is not inconsistent with that act; and its constitutionality is not to be questioned unless it be in violation of the Constitution of the United States, independently of any legislation by Congress.

In *Asbell v. Kansas*, supra, the plaintiff in error had been convicted under a statute of the State of Kansas which made it a misdemeanor to transport cattle into the State from any point south of the south line of the State, except for immediate slaughter, without having first [539] caused them to be inspected and passed as healthy by the proper State officials or by the Bureau of Animal Industry of the Interior [Agriculture?] Department of the United States. The court held that the statute was a valid exercise of the power of the State unless it were in conflict with the act of Congress. It appeared that since the decision in *Reid v. Colorado*, supra, Congress had provided that where an inspector of the bureau of animal industry had issued a certificate that he had inspected live stock and found them free from communicable disease they should be transported into any State or Territory without further inspection or the exaction of fees of any kind, except such as might be required by the Secretary of Agriculture. But as the law of Kansas recognized the Federal certificate, a conflict with the act of Congress was avoided, and hence the conviction under the State law was sustained.

Applying these established principles to the present case, no ground appears for denying validity to the statute of Indiana. That State has determined that it is necessary in order to secure proper protection from deception that purchasers of the described feeding stuffs should be suitably informed of what they are buying and has made reasonable provision for disclosure of ingredients by certificate and label, and for inspection and analysis. The requirements, the enforcement of which the bill seeks to enjoin, are not in any way in conflict with the provisions of the Federal act. They may be sustained without impairing in the slightest degree its operation and effect. There is no question here of conflicting standards, or of opposition of State to Federal authority. It follows that the complainant's bill in this aspect of the case was without equity.

Other objections urged by the bill to the validity of the statute, save so far as they may be deemed to involve the questions that have already been considered, have not been pressed in argument and need not be discussed.

[540] Recurring to the contention that the product of the complainant is not within the statute, it is evident that, assuming the validity of the enactment, the complainant showed no ground for resorting to equity, as the nature of the composition must be determined according to the fact in the course of due proceedings for that purpose.

The demurrer was properly sustained.

Affirmed.

UNITED STATES v. THOMSON & TAYLOR SPICE COMPANY.

(District Court, N. D. Illinois, June 17, 1912.)

198 Fed. 565; N. J. No. 1823.

Held that coffee shipped from the port of Aden, Arabia, whether produced in Arabia or Abyssinia, may properly be labeled "Mocha," but the label must state in which of the two countries it was produced.

Information charging misbranding in violation of the Food and Drugs Act. Judgment for penalty against defendant.

LANDIS, *District Judge*. In this case the defendant company is charged with violation of the misbranding section of the pure food law, in that there has been the use of the geographical name "Mocha" in connection with the sale of coffee grown in Abyssinia. Against the defendant it is urged that the word Mocha can lawfully be used only to designate coffee grown in Arabia. The facts are that on one side of the Red Sea is Arabia, and on the other side is Abyssinia. Coffee is, and for centuries has been, grown in both of these countries. Up to about two hundred years ago practically all of the Arabian product and a portion of the Abyssinian product was shipped through the port of Mocha, located on the Arabian side of the Red Sea. Because of this fact this coffee was called Mocha. At that time, owing to the formation of a sand bar obstructing the entrance of the harbor of Mocha, that port ceased to be the point of shipment for the coffee product, and since that time it has come out mainly through the port of Aden in Arabia. This is the case now with respect to both the Arabian and Abyssinian product, [566]¹ as it was up to two hundred years ago with respect to both products at the port of Mocha.

The pure food regulation adopted under the authority conferred by the pure food law is as follows:

(c) The use of a geographical name in connection with a food or drug product will not be deemed a misbranding when, by reason of long usage, it has come to represent a generic term, and is used to indicate a style, type or brand, but in such cases the State or Territory where any such article is manufactured or produced shall be stated upon the principal label.

As above observed, Mocha is not a place where the coffee is manufactured or produced. As above stated, it is merely the port through which originally the coffee referred to found its way to market. This being true, the above regulation plainly requires the use of the word "Abyssinian" in connection with the word "Mocha" to cover coffee grown in Abyssinia, as the same law plainly requires the use of the word "Arabian" in connection with "Mocha" to cover coffee grown in Arabia.

In view of the fact that it was agreed on all sides that this case was brought as a test to determine this question, the minimum penalty of one dollar will be imposed.

¹ Numbers in brackets refer to pages of Federal Reporter.

UNITED STATES v. DADE.

(Police Court, District of Columbia, June 19, 1912, and Court of Appeals, District of Columbia, February 25, 1913.)

N. J. No. 2516, 40 App. D. C. 94.

Milk containing a large number of bacteria, including *B. coli* and streptococci, held adulterated in that it consisted in whole or in part of a filthy, decomposed, and putrid substance.

[1] ¹ On June 15, 1912, the United States attorney for the District of Columbia, acting upon a report by the Secretary of Agriculture, filed in the Police Court of said District an information against Charles G. Dade, Washington, D. C., alleging the sale by said defendant, on February 27, 1911, in the District aforesaid, in violation of the Food and Drugs Act, of a quantity of milk which was adulterated. The product bore no label.

Adulteration of the product was alleged in the information for the reason that it consisted "in whole and in part of a filthy, decomposed and putrid animal and vegetable substance."

On June 19, 1912, the case having come on for trial before the court, without the intervention of a jury, a finding of guilty was made by the court, and a fine of \$50 was imposed. Defendant thereupon, by his attorney, moved for a new trial, and on October 12, 1912, said motion was overruled, without comment, by the court. Thereafter defendant sued out a writ of error to the Court of Appeals of the District of Columbia to set aside the judgment rendered and [2] sentence pronounced by said Police Court, and on February 25, 1913, the case having come on for a hearing before said Court of Appeals, the judgment of the Police Court was affirmed by the Court of Appeals, as will more fully appear from the following opinion:

VAN ORSDEL, *Judge*. This case is here in error to the Police Court of the District of Columbia. Plaintiff in error was convicted of violating the following provision of the Pure Food and Drugs Act:

SEC. 7. That for the purposes of this act, an article shall be deemed to be adulterated * * * in the case of food * * * Sixth. If it consist in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter. [34 Stat. 770.]

The information charged him with unlawfully offering for sale and selling adulterated milk, "in that it did consist in whole and in part of a filthy, decomposed and putrid animal and vegetable substance."

The facts established by the evidence are that on February 27, 1911, a pint bottle of milk was purchased from one of the defendant's wagons, and taken to the laboratory of the Bacteriological Bureau of the Health Department, where it was analyzed, and found to contain 4,500,000 bacteria on ordinary agar, thirty-seven degrees Centigrade, grown twenty-four hours, and 89,400,000 bacteria per cubic centimeter, on ordinary agar, twenty-five degrees Centigrade, grown forty-eight hours. It contained 83,000 bacteria per cubic centimeter of the colon group. It showed gas fermentation in one ten thou-

¹ Numbers in brackets refer to pages of Notice of Judgment.

sandth of a cubic centimeter, approximately fifteen drops, and one streptococcus to one ten thousandth of a cubic centimeter.

It appears that the bacterium known as *B. coli* or colon bacillus originates in and is a normal constituent of the colon of all warm blooded animals, is discharged in the excreta and found in milk as the result of fecal contamination. When present in milk, it always occurs from either direct or indirect fecal deposits therein; directly from carelessness in permitting particles of feces to get into the milk during the process of extracting the milk from the cow, or in handling it afterwards; indirectly, from dust, vegetation, water and air, where the bacillus is found—originally derived, however, from animal feces. The evidence discloses the study of the science to be that colon bacillus is a vegetable formation originating in animal intestines, and nowhere else. It is not found in air, dust, water or vegetation under conditions indicating different origin or its original derivation from the substance with which it is thus associated. Under favorable conditions, colon bacillus will multiply and develop in milk with great rapidity. The present analysis in the light of the evidence reveals the presence of the colon bacillus to have resulted from a direct deposit of feces in the milk, due to uncleanly methods of handling the milk.

It appears that the streptococcus is associated frequently with the colon bacillus in the colon of warm blooded animals, and is discharged in the excreta. It is also found in diseased processes of animals—in boils on human beings, or in abscesses in animals, and in diseased tissues and intestines. While milk may be perfectly sterile in the udder of a healthy cow, streptococci may be found in milk taken from a diseased udder. It, however, may be regarded as strongly conclusive that where colon bacilli and streptococci are found together in large numbers and under the circumstances here shown, they originate directly from fecal matter. They are not found in milk as it flows from a healthy animal. Their presence in milk, originally pure, indicates contamination from an outside source—as to colon bacillus, always fecal contamination; and usually the same as to streptococcus. Streptococcus may also come from a diseased condition of the cow or from persons handling the milk, but its presence was not so accounted for in this case.

It also appears that the growth of bacteria invariably results in the chemical and natural decomposition of the substance in which they grow. Milk is an animal substance, and bacteria are a vegetable formation in the milk. The bacteria develop and die in rapid succession, causing natural decomposition. Colon bacilli and streptococci destroy the sugar in milk, which is broken up into various acids and gases, thus causing chemical decomposition. For example, sour milk is described as decomposed milk, and may be caused by [3] the action of bacteria. The decomposition of milk sugar into lactic acid is a chemical process that causes milk to sour.

This case was not prosecuted upon the assumption that bacteria, as living vegetable organisms, are in themselves either filthy, decomposed, or putrid; but upon the theory, as fully sustained by the evidence, that the bacteria constantly develop and die, causing filthy vegetable decomposition; that the colon bacilli and streptococci found in the milk establish the presence of fecal matter; that streptococci,

especially, are a menace to health; that whether the streptococci came into the milk through fecal deposit, from a diseased condition of the cow or of those handling the milk, the vice is the same, and that these two groups of bacteria, especially, cause decomposition of the milk.

The Pure Food and Drugs Act is a police regulation enacted to conserve the public health. It will be construed liberally to meet the evils intended to be embraced within its provisions. *United States v. Corbett*, 215 U. S. 233; *District of Columbia v. Gardiner*, 39 App., D. C., 389; *Galt v. United States*, 39 App., D. C., 470. We are not unmindful of the rule that police regulations to be valid must be reasonable, necessary, and not unduly oppressive. The law-making power, in their enactment, takes into consideration the public sentiment of the community as a measure of the degree of regulation to which private property shall be subjected for the public good, and nowhere do the courts so completely reflect the side of public opinion as in deciding cases involving the exercise of the police power. Measures looking to the public welfare are no longer tested by the strict letter of the Constitution. Doubtless many modern expressions of the legislative will, in the exercise of its police power, would have been held unconstitutional if enacted at an earlier period. But public opinion, keeping pace with an advancing civilization, is the progressive factor which calls for an enlarged invasion of private rights for the public good, and which prompts courts to give greater elasticity to constitutional limitations. In flexibility of construction lies the possibility of progress and the vitality of the Constitution. Therefore, some of the technical distinctions cited to be applied by counsel for plaintiff in error in construing the act before us may be disposed of by the suggestion that the food offered for sale in a filthy, decomposed and putrid condition, caused either from an inherent condition, or external substance; or "consisting of" or containing filthy, decomposed or putrid matter; or containing a foreign substance, neither filthy, decomposed nor putrid in itself, but which causes the food from contact with it to decompose or become filthy or putrid, will be held to come within the act. It is beyond dispute that the milk, when taken from the wagon of plaintiff in error in the condition in which it was being sold to his customers, was both filthy and decomposed.

It is urged that since it is impossible to produce milk entirely free from bacteria, the statute imposes a duty impossible of performance, and cannot, therefore, be applied to milk; or, if possible of performance, it could only be complied with at so great a cost as to result in the destruction and confiscation of the business. It is not clear from the evidence that the enforcement of the act will produce this result. The present case does not present this difficulty, except in theory; since the contamination was so great as to place it within the statute beyond the domain of speculation. Not only did the milk in question contain bacteria of the colon group, but, as incident thereto, fecal matter, all of which, it appears, may be eliminated by the adoption of cleanly methods in handling the milk. In fact, it appears that samples from the dairy of plaintiff in error have been analyzed, which were free from bacteria of the colon group. One witness testified that he "has encountered milk, samples of raw milk and sam-

ples of pasteurized milk, free from bacteria of the colon; has seen samples of defendant's that did not contain them, milk sold as raw milk and analyzed on that assumption."

We are not dealing with a regulation relating to milk alone, but with an act generally regulating the sale of food products. Milk is a food product; and, if found to be impure, it will be held to be "adulterated" within the provisions of the act. There is evidence that it is impossible to produce raw milk which does not contain bacteria; that a limited number of bacteria in milk are practically harmless, and also that certain kinds of bacteria are, in fact, harmless. It is unnecessary to decide whether, under such circumstances, milk would be held to come within the act, since in the present case, adulteration is clearly established. The dividing line between pure and impure or adulterated food is in each instance a question of fact; but, because of the scientific distinctions involved, and the impossibility of producing raw milk entirely free from bacteria, it may be much more difficult of ascertainment in the case of milk than of other food products. Owing to the great difficulty which may be encountered in justly enforcing the law, in the absence of a fixed standard defining what is marketably pure and impure milk, in a case where the adulteration consists alone in the presence of comparatively small numbers of so-called harmless bacteria, it may well be that Congress should give attention to this subject, as has been done in many of the States, and establish a fixed standard for marketable milk, whereby milk found to contain a greater number of bacteria than that fixed by the act should come within the condemnation of the law. With the fact scientifically demonstrated that contaminated milk is a dominating factor in the propagation of tuberculosis, typhoid fever, scarlet fever, diphtheria, infantile diarrhea, and other diseases, the subject, in importance, is one of the first magnitude.

The judgment is affirmed with costs, and it is so ordered.

Affirmed.

HALL-BAKER GRAIN COMPANY v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit, August 19, 1912.)

198 Fed. 614; N. J. No. 2702.

An article invoiced and sold as "No. 2 Red Wheat" held not adulterated or misbranded on account of containing mixed wheat of an inferior grade.

Error to the District Court of the United States for the Western District of Missouri.

The Hall-Baker Grain Company was convicted of misbranding a carload of mixed wheat and of adulterating it by mixing with inferior wheat, in violation of the Food and Drugs Act, and brings error. Reversed and remanded for new trial.¹

Before SANBORN and HOOK, Circuit Judges.

[615] ² SANBORN, *Circuit Judge*. The defendant below, the Hall-Baker Grain Company, a corporation, engaged in the purchase and

¹ Reversing *United States v. Hall-Baker Grain Co.*, p. 452, *ante*.

² Numbers in brackets refer to pages of Federal Reporter.

sale of grain at Kansas City, Mo., was convicted of misbranding a carload of mixed wheat, No. 2 red wheat, and of adulterating the same by mixing other inferior wheat with it, in violation of the pure food act of June 30, 1906, 34 Stat. 768, sections 7 and 8, U. S. Comp. Stat. Supp. 1909, pp. 1191, 1192. It attacks the judgment against it on many grounds, one of which is that there was no substantial evidence of the charges against it and the court below refused to instruct the jury, as it requested, to return a verdict in its favor.

The defendant was found guilty of misbranding under the second, and adulteration under the fourth, count of the indictment. The second count was based on these provisions of section 8 of the act:

That for the purposes of this act an article shall also be deemed to be misbranded, * * * in the case of foods, first, if it be an imitation of, or offered for sale under, a distinctive name of another article; second, if it be labeled or branded so as to deceive or mislead the purchaser.

And the second count charged that the mixed wheat was offered for sale by the defendant as No. 2 red wheat, and that it was labeled No. 2 red wheat, when it was in fact mixed wheat, so as to deceive and mislead the purchasers thereof.

The fourth count was founded on this declaration of section 7 of the act:

That for the purposes of this act an article shall be deemed to be adulterated in the case of food, first, if any substance has been mixed and packed with it so as to reduce, or lower, or injuriously affect its quality or strength; second, if any substance has been substituted in whole or in part for the article; third, if any valuable constituent of the article has been wholly or in part abstracted; fourth, if it be mixed, colored, powdered, coated or stained in a manner whereby damage or inferiority is concealed.

And the fourth count charged that each of these things had been done to the carload of wheat. There was evidence tending to establish these facts: Kansas City, Mo., was a grain market. There was a public elevator capable of containing 1,000,000 bushels of wheat, operated by a corporation which had no interest in this transaction, which classified wheat purchased by the defendant and other dealers according to its quality and grade as it came to it and was inspected by the official Missouri inspectors and stored it in its various bins, so that wheat of the same grades or qualities went into the same bins and those of different grades and qualities into different bins. On receipt of orders from the owners of this wheat to ship out wheat of any grade, the elevator company loaded it out of the bin containing that grade of wheat into a car, that carload of wheat was then inspected by an official inspector of the State of Missouri and certified to be of the grade and character which he found and adjudged it to be. There were rules for this inspection that had been established pursuant to laws of the State of Missouri and the inspection was made by officers of the State. One of these rules was that No. 2 red wheat was "to be sound, well cleaned, dry, red winter wheat, weighing not less than 59 pounds to the measured bushel."

[616] On April 3, 1909, the defendant agreed to sell 5,000 bushels of No. 2 red wheat according to Missouri State inspection and Kansas City weights to the Walker Grain Company at Ft. Worth, Tex. On April 29, 1909, the elevator company, pursuant to an order from the defendant, loaded into a car 45,000 pounds of wheat which

an official inspector of the State of Missouri inspected, adjudged and certified to be No. 2 red wheat, and caused this carload of wheat to be forwarded to the Walker Grain Company in Texas. No officer or employé of the defendant ever saw this load of wheat, or had anything to do with its shipment, except to order the elevator company to ship a carload of No. 2 red wheat. There was an invoice of this wheat dated May 3, 1909, which stated that the Walker Grain Company bought of the defendant on April 3, 1909, this and another carload of "2 red wheat. * * * K. C. Wts. and Grades." No. 2 red wheat is a soft wheat, containing not over 5 per cent. of hard wheat, and soft wheat which contains from 20 per cent to 45 per cent of hard wheat is No. 2 or No. 3 mixed wheat, or some other grade of wheat, and the mixture of such a percentage of hard wheat with No. 2 red wheat depreciates its value in the Southwestern markets. This wheat was delivered to the consignee in Texas in the same condition that it was when inspected in Kansas City. When this load of wheat arrived in Texas, it was inspected by a Texas inspector, a Federal inspector and others, who found it to contain from 20 per cent to 45 per cent of hard wheat. They differed in their estimates of the percentage of hard wheat in it and in the grade of mixed wheat to which it belonged, but agreed that it was not No. 2 red wheat. It is impracticable to keep the crops of wheat of different farms separate in the transportation of and traffic in this article from the purchaser to the consumer, and it is generally bought and sold by official or established grades, according to the inspection of specified officers or persons. Such officers or persons sometimes differ in their judgments of the grades to which specific lots belong. Wheat generally contains some hard wheat and some soft wheat. Some wheat is very hard and some very soft. There are many degrees of hardness and of softness of wheat which pass imperceptibly into each other, and there is no fixed and clear line of demarcation whereby all wheat may be indubitably separated into hard wheat and soft wheat. No other facts were disclosed at the trial which are material to the question before us.

The act for the violation of which the defendant was convicted is entitled "An act for preventing the manufacture, sale or transportation of adulterated, or misbranded, or poisonous, or deleterious foods, drugs, medicine and liquors." This title and the act itself, when carefully read and considered, demonstrate the fact that the sole purpose of its enactment was (1) to protect purchasers from injurious deceptions by the sale of inferior for superior articles; and (2) to protect the health of the people by preventing the sale of normally wholesome articles to which have been added substances poisonous or detrimental to health. The clauses of the act [617] under which the defendant was convicted were evidently enacted to prevent the injurious deceit of purchasers. But where in the facts that were proved and that have been recited is there any evidence of any intent to accomplish deceit, or of any violation of the provisions of this law?

The first charge was that the carload of wheat was offered for sale under a distinctive name of another article of food, to wit, No. 2 red wheat, when it was in fact mixed wheat. The proof was that the defendant offered to sell and sold 5,000 bushels, not of No. 2 red wheat, but of such wheat as under the laws of Missouri the official

inspector of that State at Kansas City should decide and certify to be No. 2 red wheat, that it delivered the load of wheat in question pursuant to that contract and that this load of wheat was such wheat as under the laws of Missouri the official inspector of that State at Kansas City did adjudge and certify to be No. 2 red wheat. Concede that the inspector was mistaken, and that the wheat was in fact mixed wheat. Nevertheless it was the wheat which the Missouri inspector adjudged and certified to be No. 2 red wheat, and the wheat that he should so adjudge and certify and no other, whatever its actual grade, was the article the defendant offered to sell and sold. It was the undoubted right of the parties to this sale to make the Missouri official inspector the arbiter between them of the character and grade of the wheat in which they dealt, and to make his decision and inspection an ineradicable term of its description. That they did, when they agreed that the wheat sold should be No. 2 red wheat according to the Missouri inspection, and, as the defendant offered and sold no other, there was no evidence in this case that he offered one article under the distinctive name of another.

The second charge was that the wheat was labeled and marked No. 2 red wheat when it was in fact mixed wheat, so as to deceive and mislead the purchasers thereof. But there was no evidence that it was ever labeled or marked at all. The Government offered the invoice of the wheat in evidence, over the objection of the defendant, to prove a label, but this invoice contained a provision similar to that in the contract of sale to the effect that the wheat was to be governed by the Missouri grades, and the wheat had been already inspected and graded No. 2 red wheat by the official inspector several days before the invoice was issued. There was no evidence of any false labeling to deceive purchasers here.

The fourth count of the indictment charged (a) that other grades of wheat had been mixed with the wheat shipped so as to injuriously affect it; (b) that other grades of wheat had been substituted in part for the No. 2 red wheat pretended to be sold; (c) that a part of the No. 2 red wheat had been abstracted and a like quantity of wheat of inferior grade substituted; and (d) that the wheat was mixed and packed with other grades of wheat whereby damage and inferiority was concealed. But, as has already appeared, the proof was conclusive that the wheat sold and delivered was the identical article offered for sale, to wit, that wheat which under the laws of Missouri the official inspector of that State should and did adjudge [618] and certify to be No. 2 red wheat. There was no evidence that any other grade of wheat was ever mixed with that wheat or substituted in part for it, or mixed or packed with it, or that any part of it had been abstracted. The proof was that on the order of the defendant the operator of the public elevator loaded it into the car, the official inspector tested it, adjudged and certified it to be No. 2 red wheat, it was hauled without mixing, abstraction, or substitution, to the consignee in Texas, where other inspectors found it to be mixed wheat, and there the evidence on this subject ceases. There was no evidence to sustain the conviction of this defendant on either count of this indictment.

The act of Congress was not enacted to catch and punish merchants who are conducting their business by customary and approved methods with no intent to deceive purchasers, or to injure the public

health, for the mistakes of third persons over whom they have no control, nor for trivial errors of their own, which at first blush may seem to bring their action within the inhibition of the law, but by which in reality they violate neither its letter nor its spirit. Many other questions of law arose at the trial, and were discussed by counsel at the bar. But the conclusion which has been reached renders it unnecessary to consider them and because there was no evidence to sustain any of the charges in his indictment the judgment below must be reversed and the case must be remanded to the court below for a new trial; and it is so ordered.

UNITED STATES v. 30 CASES PURPORTING TO BE
GRENADINE SYRUP.

(District Court, D. Massachusetts, August 22, 1912.)

199 Fed. 932; N. J. No. 2477.

An article composed of sugar, citric and tartaric acids, and the juices of certain fruits, labeled "Grenadine Syrup," held not adulterated or misbranded.

Libel under section 10 of the Food and Drugs Act. Dismissed.

[933]¹ DODGE, *District Judge*. The thirty cases were transported from New York to Boston for delivery to a consignee. The consignee has filed a waiver of its rights in favor of the shipper. The shipper has appeared as claimant and answered the information.

The bottles contained in the cases seized are labeled "Grenadine Syrup."

The first count of the information charges that the liquor in the bottles is adulterated within the meaning of the Food and Drugs Act of June 30, 1906, in that a compound sugar syrup has been substituted wholly or in part for the food named. The second count charges misbranding within the meaning of said act, in that the label would deceive and mislead the purchaser into the belief that the food consisted of grenadine syrup, whereas, in truth and in fact, it was not grenadine syrup. The claimant denies that there has been any adulteration within the meaning of the act, and denying also that there has been any misbranding within the meaning of the act, expressly says and avers "that said food was in truth and in fact 'Grenadine Syrup.'"

The Government's contention is that "Grenadine Syrup" means only syrup composed of sugar and the juice of the pomegranate. This the claimant denies and contends that according to the accepted meaning of the words they signify only a sugar syrup having a certain color and flavor. The claimant is the manufacturer of the syrup seized and concedes that in its manufacture no pomegranates are used. According to the claimant's evidence, the syrup is composed of sugar, citric and tartaric acid, and the juices of certain fruits not disclosed. There is no evidence to the contrary, and I find this to be the fact. That the syrup contains anything which may render it injurious to health, the Government does not claim.

¹ Numbers in brackets refer to pages of Federal Reporter.

The Government has proved adulteration and misbranding if it has proved that "Grenadine Syrup" has, in common acceptance, the limited meaning it asserts. If this is the fact, a purchaser relying on the label has the right to expect to get a syrup made with pomegranate juice, and is cheated if he gets a syrup from which such juice is absent. But unless the Government has sustained the burden of proving that the words of the label carry with them the meaning claimed, according to an understanding so general as to [934] give any purchaser the right to believe that syrup so composed is what he is buying, neither charge has been established.

"Orange Syrup" or "Lemon Syrup" are words which, if used as labels, would no doubt give a purchaser the right to expect the syrup so labeled to have been made from the familiar fruits named. The pomegranate is a less familiar fruit, nor is "grenade," its French name, the name by which it is commonly known among us. "Grenadine" is nowhere used as the name of a fruit. The word is no doubt derived from "grenade," and among its meanings, in French, as the dictionaries of that language referred to show, is a syrup made of sugar and pomegranate juice. It does not necessarily follow, however, that the same meaning of the word is commonly used and accepted in this country. The question is one not to be settled by derivation or by dictionaries, except so far as these may tend to show the meaning of the word in common acceptance here. And whatever might otherwise be the force of the French definitions of "grenadine" as tending to establish the Government's contention, I must regard it as greatly diminished by the fact that there is shown to be in force in France, since April 3, 1909, a decree of the French Government, made in pursuance of legislation in 1905, for the suppression of fraud in the sale of goods and of food adulteration, which expressly provides that "the name 'Syrup of Grenadine' is limited to syrup of sugar with the addition of citric acid or of tartaric acid and flavored with vegetable substances."

Many English dictionaries have been referred to by counsel, but in only one of them is "grenadine" defined as a syrup made from pomegranates. This is Webster's New International Dictionary, published by Merriam & Co. (Eds. 1910 & 1912). Two other meanings are also given, having no relation to any kind of syrup, and the meaning first referred to is, as I understand it, given as a French meaning, rather than as a commonly accepted English meaning. No such meaning is given in Webster's International Dictionary, published by the same firm in 1904. The Century Dictionary and Cyclopedia Supplement, Ed. 1911, gives as one definition "a syrup, used for colds," and for this Larousse, one of the French dictionaries above referred to, is cited; but nothing is said about the syrup being made from pomegranates. I do not find "grenadine" defined in any other English dictionary as a syrup of any kind, the other wholly different meanings of the word are the only ones given.

According to the evidence at the trial "Grenadine Syrup" has been an article of commerce in this country only during the last ten or fifteen years. Some of the syrup dealt in under that name appears to have been imported, chiefly if not wholly, from France, and some of it to have been of domestic manufacture. No evidence was offered by the Government tending to show that any of it, whether imported or made here, has been actually made from pomegranates, or has

actually contained any pomegranate juice. The evidence satisfies me, on the other hand, that, speaking [935] generally, no pomegranates or pomegranate juice are or have been used in making either the imported or domestic syrup, and that the imported syrup has been and is made as indicated in the decree of the French Government above referred to.

The evidence fails also to satisfy me that "Grenadine Syrup" has, in common acceptation, the limited meaning claimed by the Government. While it may be true that the names under which similar syrups are known and sold are generally taken from the source of the materials used, they are also sometimes indications only of the flavor or color, and are sometimes merely fanciful—as was admitted by one of the Government witnesses. It appears to be true that, in France, whatever the definitions found in French dictionaries, syrup actually made from pomegranates would more properly be called "sirop de grenade" than "grenadine," "sirop grenadine," or "sirop de grenadine." To my mind, the fair conclusion from the evidence in the case is, that the claimant's label, in common acceptation, means not that the syrup labeled is actually made from pomegranates, but that it possesses a certain characteristic flavor and color, desired by consumers. That the purchaser of such syrup has the right, according to common understanding, to expect a syrup actually made from pomegranates, I am unable to regard as sufficiently proved. Indeed, it seems to me by no means proved that a syrup actually made from pomegranates would possess the flavor and color which purchasers of "Grenadine Syrup" have learned to desire and expect. A witness for the Government testified that he had made syrup from pomegranates, and he produced samples of the result; but it did not appear that he had ever tried to sell any of it as "Grenadine Syrup." A witness for the defense who had tried the same experiment in manufacture testified that the results were unsatisfactory both as to color and flavor.

By consent of both parties, the case has been heard before the court without a jury. My views of the law and the evidence being as above stated, I must find for the claimant, and dismiss the information.

UNITED STATES v. D. GHIRARDELLI CO.

(District Court, N. D. California, September 24, 1912.)

N. J. No. 223S.

Confectionery labeled "Ghirardelli's Italian Chocolates, D. Ghirardelli Company, San Francisco, California," and contained in a box bearing the colors and a design resembling the Italian flag, *held* not misbranded as purporting to be a foreign product.

Indictment charging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of not guilty.

In this case a product labeled "Ghirardelli's Italian Chocolates, D. Ghirardelli Company, San Francisco, California," contained in a box done in colors and design of the Italian flag, except that the crown above the shield was not used, was alleged to be misbranded for the reason that each box thereof was so labeled as to deceive and mislead

the purchaser into the belief that he was buying, and that the product was in fact, a foreign product, for the reason that each box thereof contained the words in large letters "Italian Chocolates" and was so labeled as to imitate the colors of the Italian flag and to give the package the semblance and appearance of having been manufactured in Italy, whereas in truth and in fact it was a domestic product manufactured by said defendant in San Francisco, Cal., and was not genuine Italian chocolate. The candy contained in the boxes referred to was made up of a variety of shapes, wrapped in various colored tin foils similar in style to Italian chocolate candies imported through the port of San Francisco.

CHARGE TO THE JURY.

By the COURT. [2] As I have said several times during the progress of the trial, the case lies within a very narrow compass; and it will really depend upon your answer to the question, whether or not that label is calculated to deceive a purchaser into the belief that the article contained in the box, chocolate, was manufactured in Italy.

You have heard the testimony of witnesses as to the import of the term "Italian Chocolates," and weighing the testimony that was introduced by the Government in relation thereto, and also that on the part of the defendant, just answer that question.

You must be satisfied, beyond all reasonable doubt, that a purchaser of a box of chocolates labeled as charged in the indictment, reading the label would at once conclude that the chocolates were manufactured in Italy. If there is any other construction to be placed upon it, your verdict must be for the defendant.

You will now retire, gentlemen. The clerk has prepared forms of verdict, which you will take with you.

SCHRAUBSTADTER ET AL. V. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit, October 7, 1912.)

199 Fed. 568; N. J. No. 2773.

Wine produced in California, and labeled "Crown Brand Champagne" and "Extra Dry Champagne," held misbranded.

In Error to the District Court of the United States for the Northern District of California.

Ernest Schraubstadter and Emile A. Groezinger were convicted of violating the Food and Drugs Act, June 30, 1906, and they bring error. Affirmed.¹

STATEMENT OF FACTS.

[569]² Plaintiffs in error were indicted under the Pure Food and Drugs Act, convicted, and fined each \$300, from which judgment this writ of error is prosecuted. The indictment contains three counts. In each of the counts the defendants are described as "Ernest Schraub-

¹ Affirming *United States v. Schraubstadter et al.*, p. 393, *ante*.

² Numbers in brackets refer to pages of Federal Reporter.

stadter and Emile A. Groezinger, doing business in the city and county of San Francisco, under the firm name and style of A. Finke's Widow, hereinafter called the defendants." By the first count it is charged that on the 28th day of December, 1909, they did wilfully, unlawfully and knowingly ship and cause to be shipped from the city and county of San Francisco, State and Northern District of California, to D. Holzman, at Spokane, in the State of Washington, "five cases of half bottles of so-called champagne, each bottle of which so-called champagne in each of the cases aforesaid was misbranded in the following particulars, to wit: The label on the neck of each of the bottles aforesaid contained the words 'Extra Dry Champagne' (with a design of a crown), and the main label on each of the bottles aforesaid contained the words: 'Champagne Brand Defleur Fils & Cie. Grand Vin Royal. Guaranteed under the Pure Food and Drugs Act, June 30th, 1906, Serial No. 7016' (with a design of a fancy coat of arms)." It is then charged that the said labels were designed to mislead the purchaser into the belief that the product was a champagne manufactured in a foreign country, when in truth and in fact it is not a champagne at all, but a white wine artificially carbonated, and said labels do not give any information as to the real place of production or manufacture, and the real fact is that the product in said bottles is a domestic wine artificially carbonated.

The second count charges a shipment of a like number of cases of "so-called champagne" on the same day from San Francisco to Spokane, each bottle of which was misbranded in the following particulars, to wit: "The label on the neck of each of the bottles aforesaid contained the words 'Extra Dry' (with a design of a crown), and the main label on each of the bottles aforesaid contained the words 'Crown Brand Champagne' (with the design of a crown and crossed scepters), and underneath the words: 'Guaranteed under the National Pure Food and Drugs Act, June 30th, 1906.'" And it is further charged that the product in said bottles contained was not in fact champagne, but a domestic wine artificially carbonated, and the said product was and is calculated to deceive the purchaser thereof.

The third count pertains to a sale and delivery to McDonald & Cohn, importers and wholesale liquors dealers of San Francisco, of two cases of half bottles of so-called champagne, misbranded in the following particulars, to wit: "The label on the neck of each of the bottles aforesaid containing the words 'Extra Dry Champagne' (with a design of a shield and the monogram A. F. W.), and the main label on each of the bottles aforesaid contained the words: 'Cuvee Special E. L. Mercier & Cie. Brand. Extra Dry. Guaranteed under the Pure Food and Drugs Act, June 30th, 1906. Serial No. 7016'"—which the said McDonald & Cohn caused to be shipped from San Francisco to Benson, Ariz. It is then charged with like effect as in the first count, and, further, that defendants gave to the purchaser a written guaranty that the goods so purchased complied with the provisions of the Pure Food and Drugs Act, and that in so selling said wine defendants did so with the knowledge that the same might be entered into the commerce of the country as a champagne.

Trial was entered upon before a jury, but before the same was completed the jury was discharged under an agreement that the trial

should be had before the court, waiving a jury. On conclusion of the testimony, and after hearing the argument of counsel, it was "by the court ordered that a judgment of guilty be, and the same is hereby, entered as charged in the indictment herein." Thereafter judgment was rendered as follows: "It is therefore [570] ordered and adjudged that each of said defendants pay a fine of one hundred (100) dollars, on each count of the indictment herein, consisting of three counts, to wit, the sum of three hundred (300) dollars each." Previous to the entry thereof a motion was filed in arrest of judgment, based upon the insufficiency of the indictment. [Motion overruled. See N. J. No. 1020, p. 393, *ante*.]

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, *District Judge* (after stating the facts as above). The first objection interposed by defendants challenges the sufficiency of the indictment. The alleged misbranding was preliminarily investigated by the proper officer of the Department of Agriculture, but it will be seen that the fact of such investigation is not set forth in the indictment, nor does it show that any notice was given by the Secretary of Agriculture to the defendants, notifying them of the violation of said act, nor that defendants were thereby afforded an opportunity to present evidence or to be heard. For these and other grounds of like nature it is contended that the indictment is insufficient. In other words, it is argued that the indictment should set forth the doing of the things required to be done under sections 4 and 5 of the act in question. The very contention has been set at rest to the contrary in the case of *United States v. Morgan*, 222 U. S. 274, 32 Sup. Ct. 81, 56 L. Ed. 198. The defendants in that case added mineral salts to water drawn from the water supply in New York City, and, charging it with carbonic acid, bottled and sold it as "Imperial Spring Water." An invoice of this they sold and shipped into New Jersey, and were indicted for shipping misbranded goods in interstate commerce. The indictment there, as here, did not set forth the facts the want of which it is claimed renders the present one objectionable. The court held the indictment sufficient, however, reversing the judgment of the court below to the contrary. The court says:

The provision as to the hearing is administrative, creating a condition where the district attorney is compelled to prosecute without delay. When he receives the Secretary's report, he is not to make another and independent examination, but is bound to accept the finding of the department that the goods are adulterated or misbranded, and that the party from whom they had been obtained held no guaranty. But the fact that the statute compels him to act in one case does not deprive him of the power voluntarily to proceed in that and every other case under his general powers. If, for any reason, the executive department failed to report violations of this law, its neglect would leave untouched the duty of the district attorney to prosecute "all delinquents for crime and offenses cognizable under the authority of the United States." Rev. Stats. Secs. 771, 1022 (U. S. Comp. St. 1901, pp. 601, 720). So an improper finding by the department would no more stay the grand jury than an order of discharge by a committing magistrate after an ordinary preliminary trial; for the statute contains no expression indicating an intention to withdraw offenses under this act from the general powers of the grand jury, who are diligently to inquire and true presentment make of all matters called to their attention by the court, or that may come to their knowledge during the then present service.

[571] The indictment in the case at bar must be held sufficient.

It is suggested that the evidence indisputably shows (and the entire evidence is in the record) that the defendants used the labels in good faith, believing that they had a perfect right to call their wine "California Champagne"; that it was sold as such without objection, and had been known to the trade for many years under that designation. The labels, however, which are evidentiary of the misbranding, contain no such designation or legend as "California Champagne," and the trial court found that they were misleading, and that the dress on each of the packages indicated a design to create in the minds of the consumers the impression that they were "purchasing a foreign and not a domestic product." Unquestionably there is evidence in the record tending to support this conclusion, and, being a question of fact, this court will take no note as respects the weight of the evidence.

Three other contentions are made: First, that the judgment is void, because it is single, and not upon each count, and for \$300, an amount in excess of the maximum fine for the first offense; second, that the indictment was against the defendants as an association, and hence a single fine should have been imposed; and, third, that there was no separate conviction upon each count of the indictment, hence a single judgment should have been imposed, which should not have exceeded by fine \$200. We will answer the second first, and then the third.

The indictment is against "Ernest Schraubstadter and Emile A. Groezinger, doing business in the city and county of San Francisco under the firm name and style of A. Finke's Widow, hereinafter called the defendants." The very statement shows an intendment to indict the defendants personally, and not the firm as a firm. The recitation "doing business" in San Francisco, etc., is but descriptive of the persons composing the firm, and it would be exceedingly technical to hold that such an indictment was an indictment of the firm, and not of the persons composing it. An indictment so drawn will be treated as an indictment of the individual members of the firm, and not of the firm under its firm name. *State v. Powell*, 3 Lea (Tenn.) 164. The indictment here should be treated likewise.

The form of conviction is: "Guilty as charged in the indictment." This was a conviction of the three offenses charged by the three counts of the indictment. In *Ballew v. United States*, 160 U. S. 187, 16 Sup. Ct. 263, 40 L. Ed. 388, the defendant was indicted by two counts; one charging him with wrongfully withholding from a pensioner part of the pension allowed and due her, and the other with demanding and receiving as agent a greater compensation for services in prosecuting the claim for pension than is provided by law, and the jury returned a general verdict of guilty. Speaking of the verdict, the court says:

"That in a case such as this a general verdict is proper, and imports of necessity a conviction as to both crimes, is settled"—citing *Claassen v. United States*, 142 U. S. 140, 146, 12 Sup. Ct. 169, 35 L. Ed. 966.

The verdict in the case at bar was therefore tantamount to a conviction upon each of the three counts contained in the indictment. [572] It is beyond controversy that each of said counts charges a

separate and distinct offense, based upon altogether different acts of the defendants, but of such character as were properly included in one indictment. The offenses charged are shipping or causing to be shipped misbranded goods in interstate commerce.

This brings us back to the first of the three contentions stated. The form of the judgment is that: "Each of said defendants pay a fine of one hundred (100) dollars, on each count of the indictment, consisting of three counts, to wit, the sum of three hundred (300) dollars each." The judgment could not be more specific, declarative of a purpose of imposing a fine of \$100 on each defendant under each count of the indictment; the maximum fine for the first offense being \$200. Act June 30, 1906, c. 3915, Sec. 2, 34 Stat. 768 (U. S. Comp. St. Supp. 1911, p. 1354). So that the fine imposed was not excessive. The stating of the aggregate of the fines to be \$300 did not invalidate the judgment. The case of *United States v. Peeke*, 153 Fed. 166, 82 C. C. A. 340, 12 L. R. A. (N. S.) 314, does not help the defendants' contention. It relates to cumulative sentences of imprisonment. In this case it is a sentence by fine, and when properly analyzed, it is not even cumulative, as a fine of \$100 is imposed upon each count.

Affirmed.

UNITED STATES v. J. L. HOPKINS & CO.

(District Court, E. D. New York, October 19, 1912.)

199 Fed. 649; N. J. No. 2436.

Jurisdiction for the prosecution of violations of section 2 of the Food and Drugs Act exists in the Federal court of the district from which the goods are shipped, even though the defendant does not reside in such district. Violations of the Food and Drugs Act are subject to the general statute of limitations, which is three years.

J. L. Hopkins & Co. was indicted for violating the Food and Drugs Act, and filed a plea in bar. Overruled. Jury trial. Verdict of guilty.

[650] ¹ CHATFIELD, *District Judge*. An information has been filed against the defendant company, charging a violation of the law of June 30, 1906, chapter 3915, known as the Pure Food and Drugs Law. The information alleges that the defendant corporation, on September 1, 1909, did, within the County of Kings and State of New York, unlawfully ship and deliver for shipment, by a steamboat line, from Brooklyn to Norfolk, in the State of Virginia, a certain drug, which was not properly branded as required by statute.

The other allegations have nothing to do with the questions now raised by the defendant, who has interposed a plea in bar, after appearing by attorney. This plea attacks, first, the jurisdiction of the District Court, in this the Eastern District of New York, alleging that the defendant corporation is organized under the laws of the State of New York, with its office and principal place of business within the Southern District, and not within the Eastern District.

This objection cannot be raised by a plea based upon the wording of the information. On demurrer this objection would be unavailing,

¹ Numbers in brackets refer to pages of Federal Reporter.

for the wording of the information states specifically and solely that the corporation was a corporation of this, the Eastern District. [651] The plea, therefore, is intended to raise an issue as to the actual district in which the corporation is domiciled. But this issue does not necessitate the taking of testimony, for the Government has admitted that the place of business and principal office of the corporation is 100 William Street, as stated by the defendant.

For the purposes of the argument, therefore, we can take the statement of the plea to be a correct statement of fact, and consider whether or not a corporation, having its principal place of business and its home office in the Southern District of New York, and therefore having the right, under the statute relating to civil actions, to be sued only in that district, can present the same questions and insist upon the same rights, if charged with a crime under the statute upon which the present information is based.

The law, in section 2, prohibits the *introduction into* any State of any article of food or drugs, adulterated or misbranded, and provides that any person who shall *ship or deliver for shipment*, from any State to any other State, any such adulterated article, shall be guilty of a misdemeanor.

The defendant contends that, inasmuch as the statute relates to interstate commerce, no jurisdiction can be acquired, except through the existence of interstate commerce.

That much of the defendant's contention is correct, and prosecution can be had in no district, except one in which prosecution is authorized and jurisdiction given by the statute. The question of regulation, or the manner of administration in the Department of Agriculture, could not prevail over the express language of the statute.

In Section 4 it is provided, that the Secretary of Agriculture shall at once certify the fact to the *proper* United States district attorney. This means, and means no more, than that the proceedings shall be certified to the district attorney in whose district prosecution should be had.

Section 10 provides for the seizure of goods within any district where the same may be found. But that relates to a civil proceeding against the goods themselves, and does not in any way determine in what jurisdiction a criminal proceeding can be brought. The provision of the Constitution, that the trial of all crimes shall be by jury, and such trial held in the State where the crime shall have been committed, does not in any way affect prosecution under this statute, for the State in which prosecution is to be had, is clearly defined by the statute itself.

The defendant claims that the prohibited act is the "introduction into" another State. Yet the defendant seems to admit that the prosecution can be had in the *State* of New York, although, if a strict construction were to be given to the defendant's argument, it would be necessary to hold that the crime occurred at the place of introduction of the goods into another State, thus making the place in which trial should be had, the State where the goods are received, rather than that in which they are shipped.

But this is contrary to the express provision of the statutes, which prohibits *introduction* into another State by interstate commerce, but makes the *crime* the shipping [652] or delivering for shipment

at the place in which the commerce is instituted by the physical act of shipment.

The position taken by the defendant, however, is that the prosecution can only be brought in the district where the corporation, in so far as it is able, carries out the mental and physical process, through its agent, of setting in motion activities which shall result in the shipment of the goods, through interstate commerce. But such a contention is not a literal statement of the words of the statute, nor would this law be capable of such application. Where two constructions of a statute are possible, one leading to a practical method of procedure, while the other leads only to an ineffectual or impossible position, the practical meaning should be taken, and the statute so construed as to accomplish the object for which it was intended, unless this object be plainly contrary to the results which would be obtained by the construction followed.

It is evident that the result of prosecution, in the present instance, in the Southern District of New York, would lead to the dismissal of an indictment, for no contract or order to cause the shipment of goods by interstate commerce could be construed as the actual act of shipment. Hence, the result of such a holding would be to limit prosecution under the statute to a district where prosecution could not be successful, and such construction would have been made in the face of the plain statement that the crime consists of "shipping or offering for shipment," which is the act of starting the shipment of the goods by some common carrier, or other means of transportation, having as its first step a delivery for shipment. To hold otherwise would mean a differentiation in the possession of the goods by the defendant before they were packed, while they were packed up in the warehouse, and while they were on its delivery wagon or other means of transfer, and while its own possession of these goods was entirely undisturbed.

For these reasons it is plain that the information is correct in form, in charging that the crime, if committed under the statute, began with the delivery of the goods to the steamship company in Brooklyn, and that prosecution should be had in this district.

The defendant also pleads the statute of limitation in an original way. The Pure Food and Drugs Law provides for a hearing upon notice, after examination, and, if an adulteration of a drug shall be found, that an opportunity of hearing shall be given. If after the hearing it appears that any of the provisions of the act have been violated, the statute is specific and technical in its description of the acts prohibited, and in the statement of the penalty therefor. The defendant, therefore, invokes the well-known doctrine that a specific statute, repealing in terms or in necessary effect, the provisions of the general statute, shall be held to prevail over all the provisions of a general statute, which are thus expressly or impliedly set aside.

The general statute of limitations, formerly two years and now three years, by the statute of 1876 (act April 13, 1876, c. 56, 19 Stat. 32 [U. S. Comp. St. 1901, p. 725]) is claimed by the de[653]fendant to have been repealed, inasmuch as no specific limitation is placed upon the prosecution under the Pure Food and Drugs Law, and as the language of the sections throughout the entire statute indicates

that immediate and prompt action is to be had. The defendant invokes the doctrine of laches, not so much as a sufficient defense to the prosecution of this information itself, but it relies upon that doctrine as an argument for its claim that the general statute of limitations is inapplicable, and hence, that it is inferentially repealed through the intent spelled out of the requirement for immediate action.

The defendant would apparently seek to substitute for the general statute of limitations, of three years after the commission of an offense, an ambiguous and uncertain equitable determination by the court as to whether the proceedings had been so promptly conducted that the prosecution should be allowed to go on. The theory of a statute of limitations is no longer dependent upon the presumption of some grant freeing the person interested from prosecution, or the lapse of time within which the evidence has presumably been lost. It is rather a definite period prescribed by law, within which an indictment must be filed, provided the defendant is not a fugitive. There is nothing in the Pure Food and Drugs Law which interferes with the operation of a statute of three years, beyond which delay cannot be allowed. Whether or not laches on the part of the Government officials had intervened, and whether the defendant's rights had thereby been prejudicially affected, or whether the act which was charged as an offense has been reduced to a mere technicality, would be something for the court to take into account in imposing sentence. But it cannot be said that the intent of Congress was to set up different standards of time limits for the actual filing of an indictment (either greater or less than three years as the case might be) by provisions in the law intended to assure a speedy hearing and a prompt method of determining whether acts would be considered by the department as violations of the law, from which a criminal prosecution might result. Even if the acts in question had been terminated, and the prosecution might thereby depend upon methods or practices long since discontinued, or if the defendant, because of the delay in instituting proceedings, had continued upon a course which it ultimately found would bring itself in conflict with the Government, these matters, again, would be questions to be considered in imposing sentence, and are not a bar to the filing of an information at any time within the three-year period.

The pleas must be overruled, and the defendant called upon to plead generally to the information.

On January 29, 1913, the case having come on for trial before the court and a jury, after the hearing of testimony and argument by counsel, the following charge was delivered to the jury by the court:¹

[5] VEEDER, *District Judge*. This case has taken quite a little time, and necessarily so; because in dealing with a subject matter that you are not familiar with, a great deal of evidence has been necessary to put you in a position where you can consider the matter intelligently. In other words, much of the evidence has been descriptive. In the charge I shall be brief out of all proportion to the time consumed in introducing the evidence. You must understand, at the outset, that in disposing of the motions made on behalf of the defendant, I am not expressing any opinion on the ultimate

¹ Not in Federal Reporter. See N. J. No. 2436.

question of fact which it is your province to determine. When I deem it necessary to aid the jury in the discharge of their duty by way of explanation or otherwise, it is my practice to discuss the facts; but I do not regard it necessary in this case, and I shall not undertake to do it. I must not be understood as expressing any opinion on the facts, which are entirely within your province.

The statute of the United States commonly known as the Food and Drugs Act is, as expressed in its title, "an act for preventing the manufacture, sale or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for illegal traffic therein, and for other purposes." It contains a great variety of provisions—necessarily so in view of its purpose, and I shall read to you only the parts that bear on the issue before you. It provides:

That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this Act, is hereby prohibited; and any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia, from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs, or export or offer for export the same to any foreign country, shall be guilty of a misdemeanor, and for such offense be fined not exceeding two hundred dollars for the first offense, and upon conviction for each subsequent offense not exceeding three hundred dollars or be imprisoned not exceeding one year, or both, in the discretion of the court.

I read continuously without eliminating unessential parts, so that you might get the entire sense. The punishment and penalty is something with which, of course, you have nothing to do. Now, that is the general statement of the offense. Of course, it becomes necessary, in the next place, to find out what is [6] a food and what is a drug. We are concerned in this case with an alleged drug, and the act defines a drug in this way:

That the term "drug," as used in this act, shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals.

That is the definition of a drug under this act. Then it goes on to provide as to what shall be deemed under the act adulteration and misbranding. It says:

That for the purposes of this act an article shall be deemed to be adulterated:
In the case of drugs:

First. If, when a drug is sold under or by a name recognized in the United States Pharmacopœia or National Formulary, it differs from the standard of strength, quality, or purity, as determined by the test laid down in the United States Pharmacopœia or National Formulary official at the time of investigation: *Provided*, That no drug defined in the United States Pharmacopœia or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality, or purity be plainly stated upon the bottle, box, or other container thereof although the standard may differ from that laid down in the United States Pharmacopœia or National Formulary.

I read you the whole paragraph. You see the general purpose is simply that the drug introduced into interstate commerce shall be what it purports to be. Then there is a definition of misbranding:

That the term "misbranded," as used herein, shall apply to all drugs or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

That is the definition of misbranding. Differing somewhat from the case of adulteration, the act goes on to specify:

That for the purposes of this act an article shall also be deemed to be misbranded:

In case of drugs:

First. If it be an imitation of or offered for sale under the name of another article.

Now that is as much of the law as is necessary to read for your consideration of this case. The information contains two counts. The first count charges adulteration, the second misbranding. The charge in the first count is that the defendant violated this law by this shipment in evidence, consigned to Burrow Martin and Company in the State of Virginia, which is alleged to be a drug and a medicine recognized in the United States Pharmacopœia for internal use and a substance intended for the cure, mitigation and prevention of disease of man, to wit: a gum purporting to be gum tragacanth in a package and container labeled as follows: "5 lbs. No. 1 Tragacanth Gum, U. S. P. (*astragalus gummifer*) J. L. Hopkins & Co. New York." It is alleged that that article so shipped was adulterated in that it was sold under and by a name recognized in the United States Pharmacopœia, to wit: gum tragacanth, and differed from the standard of strength, quality and purity as determined by the test laid down therein at the time of shipment, in that it was not gum tragacanth, and was not a gummy exudation from *Astragalus gummifer* Labillardiere [7] or from other species of *Astragalus*, but was powdered Indian gum; also in that it failed to conform to the test laid down in said Pharmacopœia, among others, the test of sodium hydroxide, iodine and alcohol, and the standard of strength, quality and purity therein is not stated on said package, excepting the false statement that said article conformed to the standard prescribed in the United States Pharmacopœia, and the strength and quality fell below the professed quality and standard of the United States Pharmacopœia, and was not such, but was of the character hereinbefore described.

Now, in the first place, the Government must prove the sale and introduction into interstate commerce. The act, you will observe, makes the offense the introduction into interstate commerce; but in this first count of the information a sale has been alleged, and although I should be justified under certain circumstances in striking that out as surplusage, it has been alleged in such a way that it cannot be stricken out as surplusage, and therefore the Government must prove it. The evidence on that point is before you from inception to conclusion. The introduction into interstate commerce is compromised necessarily within the sale to this consignee in Vir-

ginia, if you find that there was a sale, but you are to find as a fact whether there was a sale. The motive back of the sale is something that you need pay no attention to. The fact is the thing that you are concerned with—was there an actual sale?

Then, was this article in exhibit two a drug, as alleged. Now a drug, I repeat—and this is your guide—includes all medicines, and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation and prevention of disease of either man or other animals. It refers you to the United States Pharmacopœia. You are to look at the entry of tragacanth in that book, in connection with the limitation or explanation made in the preface, and then upon a consideration of that, in connection with all the other evidence in this case, you are to find the fact, was this a drug?

In the third place, was it adulterated within the meaning of this act. The definition of adulteration is, you will recall, if when a drug is sold under and by a name recognized in the United States Pharmacopœia or National Formulary it differs from the standard of strength, quality or purity as determined by the test laid down in the United States Pharmacopœia or National Formulary official at the time of investigation. There is your guide for the consideration of this question. Take the statement of the Pharmacopœia, not only in the text, but in the preface, and upon all the evidence in the case find whether this article was adulterated within the meaning of the act.

The second count relates to misbranding. That count is not complicated by any allegation of sale, so that, under this count, you are to find, first, whether the defendant shipped, introduced, into interstate commerce this article. Then, everything I have said to you in connection with the first count on the question whether the article is a drug applies here, because the defendant is charged with misbranding a drug. Then, as before, in the third place, with respect to this count you are to find whether the article was misbranded. I repeat the definition that the term misbranded, as used herein, shall apply to all drugs, the package or label of which shall bear any statement, design or device regarding said article or ingredients or substances contained therein, which shall be false or misleading in any particular, and to any drug product which is falsely branded as to such territory or country in which it is manufactured and produced; for the purposes of this act, an article shall also be [8] deemed to be misbranded, in case of drugs, if it be an imitation of or offered for sale under a name of another article. Here, as under the other count, you are to take the United States Pharmacopœia—not only the text, but the preface, with such limitation and explanation as it contains, and in the light of that, and all the other evidence, you are to find whether this article was misbranded as specified in the act.

That is practically all I have to say to you—to point out just what you have to do. It is for you to do it, on your own responsibility. A good deal has been said in the argument about crime. I must call your attention to a strict rule applicable to all criminal prosecutions, which applies in its full extent to this case. The Government must prove its case beyond a reasonable doubt. That is to say,

if, after a consideration of all this evidence, you have any reasonable doubt as to any one of the three elements that enter into each of these two counts, the defendant is to have the benefit of that doubt, and it is your duty to return a verdict of not guilty; or, to put it the other way, the Government must prove to you beyond reasonable doubt all the elements that I have enumerated under each count—

MR. HITCHINGS. I understand, your honor, that you will mark on my requests—

THE COURT. Yes, I was just looking them over. I don't think there is anything else there that I wish to charge that I have not already charged, although I may not have employed the precise language.

MR. HITCHINGS. I understand your honor will mark on them separately, and I will have the benefit of an exception.

THE COURT. Yes, I will mark each one.

MR. HITCHINGS. I have only one request in addition to what your honor has said. I ask your honor to charge in the language of section four at the end, after judgment of the court, notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid.

THE COURT. I refuse to charge it. That is something with which the jury has nothing to do.

MR. HITCHINGS. Exception.

THE COURT. I have expressly charged you in very general terms, and I shall only add that you are to recollect that there are two counts. The first one for adulteration, the second for misbranding. If you find the defendant not guilty on both counts, of course your verdict will be a general verdict of not guilty. Likewise, if you find the defendant guilty on both counts, your verdict will be a general verdict of guilty. But if you find reason to discriminate between the two counts you will so specify in your verdict. You understand that if you desire any of these exhibits you can call for them, and I will see if they can not be supplied.

Thereupon the jury retired and, after deliberation, returned a verdict of guilty. When the verdict of the jury was announced counsel for defendants moved to set the same aside as contrary to the evidence.

On February 10, 1913, decision having been reserved by the court until that time, the motions to set aside the verdict were denied and sentence was suspended, as will more fully appear from the following decision by the court:

VEEDER, *District Judge*. I have considered this case, and I see no reason why the verdict of the jury should be disturbed. I deny the motions to set aside the verdict.

[9] Now, on the matter of sentence, I have this to say. Much was said during the trial of the case about criminality. Now, criminality, in the proper sense of the term, is not involved in a prosecution of this kind. Certainly there is nothing in this particular case involving any criminality. Some of the theories of the defense were not calculated to commend themselves to the court. But with the testimony of Mr. Hopkins himself—the president of this concern, the man most interested—I was favorably impressed. I think it was frank and

straightforward. It shows that he proceeded upon a misapprehension of the law. I think it was an entire misapprehension; but, at the same time, the law is not so perfectly clear that it can be said that it is impossible to misconceive it. This is what the finding in this case amounts to, and no more. Moreover, it was a violation of the law with respect to a drug that is entirely harmless and involves no danger to anybody. I think, therefore, that this is a matter of principle with the Government, not a matter that calls for punishment. I understand that this is the third prosecution for this particular offense, am I not right?

Mr. HITCHINGS. That is right.

The COURT. Now the expense involved to the defendant in the defense of these prosecutions goes far beyond any fine that I am permitted by statute to impose, and in itself involves sufficient punishment. In this case, therefore, I suspend sentence.

UNITED STATES v. POTTER.

(District Court, E. D. North Carolina, October 29, 1912.)

N. J. No. 2316.

An article of food, contained in cans labeled "Cove Oysters, First Quality," held not adulterated or misbranded because of the fact that the cans contained about 90 per cent of liquid.

Information filed by the United States against G. D. Potter and E. H. Potter, trading as the Beaufort Little Neck Clam Co., Hampstead, N. C., charging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of not guilty.

CONNOR, *District Judge* (charge to the jury). [2] In this case, the Government charges that the defendants engaged in canning oysters in a manner which violates the provisions of the act of Congress passed for the purpose of securing pure food for the people of the United States. That oysters were canned by defendants in North Carolina and sold in West Virginia in violation of the provisions of that statute, in that the oysters were adulterated. The defendants admit that they packed oysters in North Carolina and shipped them to a house in Norfolk, Virginia, the Norfolk house shipping them to Charleston, West Virginia; in other words, the oysters were shipped from Hampstead, N. C., to Charleston, W. Va. The defendants say, however, that the oysters were not adulterated, and that is the question upon which you will pass. It is not a question of law—it is rather one of fact. The word "adulteration" has several definitions as applied to different subjects. In this connection, the statute undertakes to define the word "adulteration" to be to put something in the can, in this instance, which has the effect of reducing the quality or strength of the article to be sold. The oyster, of course, we all understand, is not only palatable as an article of food, but is nourishing. In it are certain elements which, being taken into the system as food are nourishing. It satisfies hunger and nourishes the body. Therefore, the statute provides that any substance put into the can which reduces, lessens or weakens the strength of the article of food, that is, renders it less efficient, less capable of performing the purpose for which it is eaten, is adulteration.

It is in evidence that several cans of oysters, which were shown to you, were prepared at Beaufort, N. C., by the defendants, were found in the store of Ruffner Bros., at Charleston, West Virginia. Certain of these cans were obtained by the inspector sent out by the Department of Agriculture, carried to Washington and there delivered to a chemist employed by the department, for the purpose of ascertaining whether they measure up to the standard required by law.

It is in evidence here that two of these chemists examined these oysters. One of them tells you that he examined the can and found it to weigh 12.4 ounces gross. He then took the oysters out and found the net weight was 10.6 ounces. He then separated the oysters from the water found in the can and the water weighed 9.4 ounces, the oysters weighing 1.2 ounces, making the net weight of the contents of the can. He then shows you the can and what was in it, which you have seen, and you can use this information in coming to your verdict. These facts are without contradiction. The chemist tells you the process by which the oysters are prepared for canning. He tells how they are put in steam boxes, how steamed, shucked, run through fresh water and washed out and put into the cans. He tells you it is usual to put into the can some water with a certain per cent of salt. So much water is poured into the cans as will fill in the spaces which are left between the oysters, the cans are then filled up, and that quantity of water will not injure the oysters, and while not necessary for their preservation, will not greatly injure them. He then shows to you a sample of oysters purchased in Baltimore, for which he says he gave a higher [3] price than for the oysters in controversy. It is conceded that the oysters canned by the defendants are sold at 40 cents a dozen cans and retail at 5 cents per can. The Government says that upon this testimony you ought to find that these oysters canned in the manner and found in the condition described are adulterated—that is, more water was put in than necessary for their preservation; in other words, water put in merely to fill up the can. They counted the oysters and found in one can 15 and in another 18. You saw what proportion of the glass they filled when poured out. One of the defendants goes upon the stand and states that he canned these oysters in the manner described by the Government expert, and says after the oysters are ready to be put into the cans that they have different standards, and that it depends not upon the quality, but upon the quantity of oysters put into the can. For instance, they put into the cans of the "Jim Crow Brand" 1.5 ounces, and that they are then closed up and labeled or branded "Jim Crow Brand," and that the words "First Quality, Cove Oysters, Packed by the Little Neck Clam Company," etc., also appear; and he further says that he takes oysters, without regard to their size, and puts them into cans not exactly the same size, which he brands "Harbor Island," and these cans contain three or four ounces, that there are other brands which are sold at different prices. The defendant says that the brand does not indicate the quality of the oyster, the size or fitness for eating, but only the quantity put into the can, and that is what is meant when he says that the Jim Crow Oyster is a "light weight," and that weight is the only standard by which the business is carried on and conducted.

The department has, I think correctly, interpreted and construed this statute to mean that in putting up an article like oysters a sufficient quantity of brine may be put into the can to preserve it. Literally construed, to put any water into the can would be adulteration, but the department says in administering this law it will recognize the right of a person canning these articles like oysters, etc., to put into the can sufficient quantity of water or brine to preserve it. Therefore, in this case, if no more water was put into this brand of "Jim Crow" oysters than was necessary to keep them in proper shape and form for use and consumption, and it did not lower or lessen the value of the oysters, as an article of food, the defendants have not violated the law, and if you find that this is the case, you will say that the defendants are not guilty. However, if they put more water in this brand of oysters than was necessary to keep them in proper condition—more water than was reasonably necessary, and which had the effect upon the oysters of extracting from or weakening them as an article of food, then you will say that the defendants are guilty.

Mr. Potter tells you that the different prices charged indicate not the quality but the quantity of the oysters, and that there is no purpose in the way these oysters are branded to mislead any one as to the quantity or quality, as the trade understands that when he says a light weight oyster the can contains only 1.5 ounces. The chemist says upon weighing this can and the contents he found the oysters only weighed 1.2 ounces, whereas according to the standard of Mr. Potter there ought to have been 1.5 ounces; therefore, if the oysters, as originally canned, only weighed 1.2 ounces, this can would not measure up to his own standard. How this difference occurred, I do not know, unless you should come to the conclusion that the difference in weight is accounted for by the effect of the water upon the oysters, absorbing from the oysters some organic matter. That is a matter for you to say, however. If you find that the effect of the water was to reduce the strength of the oysters, you will find the defendants guilty. Or, if you find that more water was put in than the proper [4] method of canning as defined by the department states shall be placed in such articles of food, you will say that they are guilty; otherwise, not guilty.

As it has been said to you, in a case of this kind of article, the purpose of the law is to protect the people against impure food, where the quantity or quality, or value of a food, is so adulterated as to reduce the strength of the food value. The whole purpose of the law is to have the quality of an article as well as the quantity just as described upon the label. You will try the case and say whether in your opinion the defendants are guilty; otherwise, you will say that the defendants are not guilty. Take the case, gentlemen.

UNITED STATES v. LEHN & FINK.

(District Court, S. D. New York, November 6, 1912.)

N. J. No. 2841.

Oil of cassia which failed to comply with the standard of strength, quality, and purity, as determined by the test laid down in the United States Pharmacopœia, held adulterated and misbranded.

Information alleging adulteration and misbranding in violation of the Food and Drugs Act. Jury trial. Verdict of guilty.

On August 6, 1912, the United States Attorney for the Southern District of New York, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against Lehn & Fink, a corporation, New York, N. Y., alleging shipment by said company, in violation of the Food and Drugs Act, on May 12, 1911, from the State of New York into the State of Texas, of a quantity of oil of cassia which was adulterated and misbranded. The product was labeled: "1 lb. O. L. Cinnamoni Oil Cassia U. S. P. Serial No. 2. Lehn & Fink, distillers and importers of essential oils New York."

Analysis of a sample of the product by the Bureau of Chemistry of this Department showed the following results: Specific gravity at 25° C., 1.0592; assay for cinnamic aldehyde, 80 per cent; rotation in 100 mm. tube, +2.27°; lead and copper absent; soluble in 2 volumes of 70 per cent alcohol; lead acetate test for resins, positive; copper acetate test for rosin, positive; rosin present; nonvolatile residue, 13.3 per cent.

Adulteration of the product was alleged in the information for the reason that it was sold under and by a name recognized in the United States Pharmacopœia or National Formulary, to wit, oil of cassia, and differed from the standard of strength, quality, and purity as determined by the tests laid down in said Pharmacopœia official at the time of investigation with respect to the specific gravity and rotation of said article, and the absence therefrom of resins, and the standard of strength, quality, and purity of said article was not stated upon the container thereof or in the label thereof. Misbranding was alleged for the reason that the package and label on the article bore a statement, to wit, "Oil Cassia U. S. P.," regarding it and the ingredients and substances contained therein which was false and misleading; that is to say said statement conveyed the impression that the product was of the standard laid down in said Pharmacopœia for the article or drug which the product purported to be, to wit, oil of cassia, whereas it did not comply with the standard with respect to its specific gravity, rotation, and the absence of resins.

On November 6, 1912, the case having come on for trial before the court and a jury, after the submission of evidence and argument by counsel, the following charge was delivered to the jury by the court:

HOUGH, *District Judge*. We have listened for a couple of hours to some long, hard words; but, like every criminal case, we get down to a question of fact, not difficult to state, and (I think) not difficult to understand.

The Pure Food and Drug Act has been much talked of in the last half dozen years. The object, as you have been told, is to enable the consumer to know what it is in the way of food or drugs that he is putting in his stomach; and, to punish anybody who, whether by willful design or carelessness or inadvertence—it doesn't make a particle of difference which—puts forth for human consumption as food or drug that which is not what it pretends to be. The statute has other objects, but this is probably the leading purpose.

I do not quite agree with Mr. Newman, who told you that the point in this case is the difference between rosin and resin. There is a plain difference. We are told, if we needed to be told, that rosin is that well-known article of commerce that comes out of a species of pine tree, and is in a state of nature, mixed with what we call turpentine. It is used for a large number of well-known and homely purposes, as for instance soldering tin cans or helping to solder them. Rosin is a resin; that is, it is a resinous substance. It may be that some members of the jury were brought up in the country and can remember what spruce gum was like. Well, that is also a resinous substance, and there are many other resinous substances in nature.

This oil of cassia or cinnamon is made out of a plant that does not grow in this country. It is mostly manufactured in China by the process of distillation, and I take it that every man here has some general idea how whisky or other distilled spirits are made. In its simplest form the thing which is to be distilled is boiled and the steam of the boiling is condensed into a fluid which is in its ultimate form of the same kind, and yet chemically differs from that from which it originated.

It appears by the uncontradicted evidence that since the substance which results after distillation, oil of cassia, is very heavy, its heating has to be supplanted or aided by a direct blast of steam. Anyone can see that that may result in the carrying over of particles into the distillation that by a milder process, so to speak, would not be so carried over.

Mr. Wyckoff says that there is in this plant, which produces, among other things, the oil of cinnamon or cassia, a resinous substance, and that in the process of distillation such resinous substances by the force of the heat and steam are in part carried over into the oil; but they are a natural product of the plant and must be expected to be found in the finished product.

The chemists for the Government (as I understand them), deny that there is any such resinous property in the cassia cinnamon plant. I advise you that if there is any natural resinous substance in the cassia cinnamon plant, then there is nothing in the law which makes it unlawful for that resinous substance to be found in the finished product that we call oil of cinnamon or cassia. But, says the Government, we got oil of cinnamon or cassia that was sent by Lehn & Fink to Texas; we had that analyzed and the gentlemen who analyzed it have been before you. They say they know rosin when they see it, and they found that this particular oil of cassia contained 5 or 6 per cent of *rosin*. Then it seems, by way of trying to straighten the matter out, that a portion of this sample of cinnamon oil was sent to Lehn & Fink, and Wyckoff analyzed it—and he says that he

did not find any rosin. He did find, however, all the other things that the other gentlemen found, and (except as to rosin) there is no substantial difference between their chemical investigations. But, when he applied the test that ought to have showed rosin if there was any rosin there, he got no precipitate—found no solid residuum of rosin; but he did find about five and one-half per cent of a *resinous substance*, which, in his opinion, was the natural resin of the cassia cinnamon plant.

There is the whole story. Mr. Wyckoff says he found between five and six per cent of resinous substance and says that is natural to the article; the Government inspectors found, they say, about the same percentage of rosin.

When we turn to the standard books in evidence before you, the Formulary says that it is common to adulterate oil of cassia with rosin and petroleum; and, when you turn to the Pharmacopœia various tests are given for the purpose of finding out whether there is rosin—not resinous substances, but rosin and petroleum in oil of cassia. Nobody says there is any petroleum in this specimen, but the Government by its witnesses says there was rosin in it. The defendant by its witnesses says there wasn't any rosin in it at all, and that is the question.

Now, if you are thoroughly satisfied that there was rosin in this oil of cassia, then the defendant is guilty; if you are not satisfied, thoroughly satisfied that there was rosin in this oil of cassia, then it is not guilty.

By way of argument the defendant advances to you this proposition. It is worthy of consideration. The Pharmacopœia says that the active principle—the cinnamic aldehyde—that is in oil of cassia need only amount to 75 per cent, and this specimen had more of the active principle in it than the Pharmacopœia required. That is admitted. Therefore the interrogatory is made, why should anybody adulterate something better than the standard?

Mr. Smith for the prosecution is entirely right in saying that there is not the slightest effort here to show that Lehn & Fink ever put anything in this oil. It is admitted they got this article from China and sold it to Texas as it came from China, so that whatever there was in the article when it got to Texas (so far as we know here) must have been put in in China. But when a man gets an article from the ends of the earth and then puts it forth with a label on it, which in effect says, "This corresponds to the law of the United States," it is his business to see that it does correspond, so it doesn't make any difference where it came from or who put in the rosin, if there was any. The question is as I put it to you now: Was there 5 or 6 per cent of rosin in this oil of cinnamon, or was there not? If there was, then you should find a verdict for the Government; if there was not, then you are to find a verdict for the defendant.

Thereupon the jury retired and after due deliberation returned into court with a verdict of "guilty," and the court imposed a fine of \$150, this being the second offense of the defendant corporation.

FOUR HUNDRED AND FORTY-THREE CANS OF FROZEN EGG PRODUCT v. UNITED STATES.

(United States Supreme Court, December 2, 1912.)

226 U. S. 172; N. J. No. 2437; Circular No. 68, Office of the Solicitor.

Proceedings by libel under section 10 of the Food and Drugs Act, can only be reviewed as at common law by writ of error, and the circuit courts of appeals are without jurisdiction to review such cases on appeal.

Appeal from and in Error to the Circuit Court of Appeals for the Third Circuit. Reversed.¹

The facts are stated in the opinion.

[177] ² Mr. Justice DAY delivered the opinion of the court.

This case is here on both writ of error to and appeal from a decree of the Circuit Court of Appeals for the Third Circuit, reversing the judgment of the United States District Court for the District of New Jersey dismissing a libel brought by the United States which had for its object the condemnation of 443 [178] cans of frozen egg product seized under the pure food act of June 30, 1906 (34 Stat. 768, c. 3915).

The United States filed its libel alleging that 443 cans of frozen egg product, in the possession of the Merchants' Refrigerating Co., at Jersey City, New Jersey, consisted in whole or in part of a "filthy, decomposed and putrid animal, to wit, egg substance," and praying for their condemnation. At the trial the issues were narrowed so as to exclude filthy and putrid substances, leaving the charge to stand as to decomposed substance. Three hundred and forty-two cans were seized. The H. J. Keith Co. appeared and claimed the goods, denying the charges concerning them. The case was tried without a jury to the district judge, who entered a decree dismissing the libel. The United States took an appeal to the circuit court of appeals, and, after consideration in that court, the decree dismissing the libel was reversed and, upon the facts, a decree of condemnation in favor of the Government was entered. (193 Fed. 589.) The claimant, the H. J. Keith Co., thereupon appealed to this court, and also sued out a writ of error to the same decree.

We are met at the outset with a question of jurisdiction. Section 10 of the pure food act provides:

That any article of food * * * that is adulterated or misbranded within the meaning of this act, and is being transported from one State * * * to another for sale, * * * shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. * * * The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States.

[179] It will be observed that the last sentence of the section provides that "the proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in

¹ Reversing *United States v. 443 Cans of Frozen Egg Product*, p. 507, *ante*.

² Numbers in brackets refer to pages of U. S. Reports.

the name of the United States." The contention of the Government upon this question of jurisdiction is that the words, "conform, as near as may be, to the proceedings in admiralty," means, except in cases where jury trial is demanded, to include appellate proceedings, as well as original proceedings in the district court, and therefore the review of the judgments of the district court would be by appeal to the circuit court of appeals, as in admiralty cases under the circuit court of appeals act (26 Stat. 826), and under the judicial code (36 Stat. 1087, 1133, c. 231, sec. 128). If that is a proper construction of the statute, then the circuit court of appeals had the right to review the case upon the facts and enter a final decree, which, under the circuit court of appeals act and judicial code, would be reviewable here only upon writ of certiorari.

The appellant, also plaintiff in error, contends that the seizure being upon land, the proceeding was at law and reviewable only upon writ of error in the circuit court of appeals; that the attempted appeal did not give the circuit court of appeals jurisdiction, and that upon the writ of error here this court should reverse the judgment and remand the case to that court with directions to dismiss the appeal.

The determination of this controversy requires some examination of previous legislation and of the decisions of this court interpreting such legislation as to the nature and extent of the jurisdiction of the district courts of the United States in seizure cases.

The judiciary act of 1789 (1 Stat. 73, 76, c. 20, sec. 9) gave to the district courts:

[180] Exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of 10 or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it; and * * * also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States.

In the case of *The Sarah*, 8 Wheat. 391, a libel was filed against 422 casks of wine alleging a forfeiture by false entry. It appearing in the course of the trial that the seizure was made on land, it was held that this court could not review the case save upon writ of error. Chief Justice Marshall, delivering the opinion of the court, said (p. 394):

By the act constituting the judicial system of the United States, the district courts are courts both of common law and admiralty jurisdiction. In the trial of all cases of seizure on land, the court sits as a court of common law. In cases of seizure made on waters navigable by vessels of 10 tons burthen and upwards, the court sits as a court of admiralty. In all cases at common law, the trial must be by jury. In cases of admiralty and maritime jurisdiction, it has been settled, in the cases of *The Vengeance* (reported in 3 Dallas' Rep. 297); *The Sally* (in 2 Cranch's Rep. 406); and *The Betsy and Charlotte* (in 4 Cranch's Rep. 433), that the trial is to be by the court.

Although the two jurisdictions are vested in the same tribunal, they are as distinct from each other as if they were vested in different tribunals, and can no more be blended than a court of chancery with a court of common law.

A statute, practically the same, with some slight changes, was embodied in section 563 of the Revised Statutes, [181] subdivision 8, giving the district courts jurisdiction "of all civil causes of admiralty and maritime jurisdiction * * * and of all seizures on land

and on waters not within admiralty and maritime jurisdiction," the subdivision mentioned omitting the provision found in the section of the judiciary act of 1789 to which we have referred as to seizures "within their respective districts," and including cases of "seizures on land and on waters not within admiralty and maritime jurisdiction." Under this statute it has been uniformly held that the district court as to seizures on land proceeds as a court of common law with trial by jury and not as a court of admiralty. *United States v. Winchester*, 99 U. S. 372.

Questions analogous to the one here came before this court in construing the confiscation acts enacted in 1861 and 1862. This court, in *Union Insurance Co. v. United States*, 6 Wall. 759, construed the act of Congress of August 6, 1861, entitled "An act to confiscate property used for insurrectionary purposes." That act provided for the seizure of such property and its condemnation in the district or circuit court having jurisdiction of the amount, or in admiralty in any district in which the property might be seized, and authorized the Attorney General to institute proceedings of condemnation. In that case it was held that in the condemnation of real estate or property on land the proceedings were to be shaped in general conformity to the practice in admiralty, but in respect to trial by jury and exceptions to evidence the proceedings should conform to the course of proceeding by information on the common-law side of the court. It was held that where proceedings for the forfeiture of real estate were had in conformity with the practice in courts of admiralty they could not be reviewed in this court by appeal, and that the case could come here only for the purpose of reversing the decree and directing a new trial.

In the case of *Morris's Cotton*, 8 Wall. 507, this court [182] had under consideration the acts of 1861 and of July 17, 1862, which act provided (12 Stat. 589, 591, sec. 7) for the institution of proceedings in the name of the United States in any district court, etc., where the property might be found, etc., "which proceedings shall conform as nearly as may be to proceedings in admiralty or revenue cases." In the *Morris* case it was said (p. 511):

Where the seizure is made on navigable waters, within the ninth section of the judiciary act, the case belongs to the instance side of the district court; but where the seizure was made on land, the suit, though in the form of a libel of information, is an action at common law, and the claimants are entitled to trial by jury.

Seizures, when made on waters which are navigable from the sea by vessels of 10 or more tons burden, are exclusively cognizable in the district courts, subject to appeal, as provided by law; but all seizures on land or on waters not navigable, and all suits instituted to recover penalties and forfeitures incurred, except for seizures on navigable waters, must be prosecuted as other common-law suits, and can only be removed into this court by writ of error.

This jurisdiction of the district court was known to Congress at the time it passed the Pure Food Act, as were the decisions of this court construing the former acts of Congress, and it declared that such proceedings shall conform to those in admiralty, as near as may be, giving to either party, however, the right to demand a trial by jury in case of issues of fact joined. We think this act must be held to have been passed not to confer a new jurisdiction upon the district court, but in recognition of the jurisdiction already created in seizures upon land and water. The act makes no reference, in conforming the proceedings as near as may be to those in admiralty, to

appellate procedure. It leaves that to be determined by the nature of the case and the statutes already in force. It is true that the right of trial by jury is preserved, where demanded [183] by either party. We think Congress inserted this provision with a view to removing any question as to the constitutionality of the act. It was held under the confiscation acts, although no such specific provision is contained, that the action provided was one at common law, with a right to trial by jury. The seventh amendment to the Constitution preserves the right of trial by jury in suits at common law involving more than \$20, and provides that no fact tried by a jury shall be reviewed otherwise than according to the rules of the common law. Having in mind these provisions and as well the construction of the previous acts, we think it was the purpose of Congress to leave no doubt as to the right of trial by jury in the law proceeding for condemnation which the act intended to provide.

These proceedings for the seizure and condemnation of property which is impure or adulterated are intended to be in a sense summary, and yet the statute as we have construed it gives the owner a right to a hearing in a court of record with a right of review upon questions of law by writ of error in the circuit court of appeals, and, where more than \$1,000 is involved, finally in this court (sec. 6 of the circuit court of appeals act). It is to be noted in this connection that where the examination of specimens of food or drugs made by the Department of Agriculture shows that the articles are adulterated or misbranded, the parties from whom the specimens were obtained are (sec. 4 of the act) given a hearing before the matter is certified to the district attorney by the Secretary of Agriculture.

We do not think it was intended to liken the proceedings to those in admiralty beyond the seizure of the property by process *in rem*, then giving the case the character of a law action, with trial by jury if demanded and with the review already obtaining in actions at law. It is true that, if the action is tried in the district court without a [184] jury, the circuit court of appeals is limited to a consideration of such questions of law as may have been presented by the record proper, independently of the special finding. *Campbell v. United States*, 224 U. S. 99. But the party on jury trial may reserve his exceptions, take a bill of exceptions and have a review upon writ of error in the manner we have pointed out.

It is insisted for the Government that inasmuch as the hearing in the circuit court of appeals upon appeal was without objection by the claimant, the jurisdictional objection was waived. We can not take that view. As we construe the statute, the circuit court of appeals had no jurisdiction upon the appeal, and neither the action of the court nor the consent of the parties could give it. *Leo Lung On v. United States*, 159 Fed. 125; *Jones v. La Vallette*, 5 Wall. 579; *United States v. Emholt*, 105 U. S. 414; *Perez v. Fernandez*, 202 U. S. 80, 100.

As the circuit court of appeals, in our opinion, proceeded without jurisdiction by reason of the appeal, this court, having acquired jurisdiction, should reverse the judgment of the circuit court of appeals and remand the case to that court with instructions to dismiss the appeal for want of jurisdiction. *Union & Planters' Bank v. Memphis*, 189 U. S. 71.

Judgment accordingly.

UNITED STATES v. THREE BARRELS VANILLA TONKA
AND COMPOUND.

(Circuit Court of Appeals, Fifth Circuit, December 17, 1912.)

N. J. No. 2350.

Proceedings under section 10 of the Food and Drugs Act, by libel for the condemnation and forfeiture of an article of food alleged to be adulterated and misbranded are at common law, and are reviewable only on writ of error. Circuit courts of appeals have no jurisdiction to review such cases on appeal.

Appeal by the libelant from the decree of the District Court of the United States for the Western District of Texas dismissing a libel filed by the United States under section 10 of the Food and Drugs Act, for the condemnation and forfeiture of three barrels of "Vanilla Tonka and Compound" alleged to be adulterated and misbranded. Appeal dismissed.¹

ASSIGNMENT OF ERRORS.

[1] I. That the court erred in rendering judgment and entering decree against libelant on the pleadings in said cause, and that said decree is contrary to law and the facts as alleged and stated in the pleadings in said cause.

II. That the court erred in finding and holding upon the evidence and facts appearing on the trial of said cause, that the three barrels of vanilla tonka and compound seized and sought to be condemned herein were not transported and shipped in interstate commerce for sale within the meaning of the Food and Drugs Act of June 30, 1906, and upon such finding and holding entering judgment that the property libeled herein can not be condemned, and that libelant take nothing by this its suit, and that the libel proceedings herein be dismissed.

III. That the court erred in finding and holding upon the evidence and facts appearing on trial of said cause that as no evidence had been introduced showing that the Secretary of Agriculture had caused notice to be given to the party from whom the sample was obtained and [2] giving him an opportunity to be heard, as prescribed in section 4 of the Food and Drugs Act of June 30, 1906, that the libel proceedings against said three barrels of vanilla tonka and compound herein could not in law be instituted, had, and maintained herein, and in entering judgment that libelant take nothing by this its suit, and that the libel proceedings herein be dismissed.

IV. That the court erred in holding that libelant was not entitled to recover, and in granting and entering final decree that libelant take nothing by this its suit, and that the libel proceedings herein be dismissed, and in not entering a decree in favor of libelant. Wherefore, libelant, appellant, prays the judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the premises, and that the decree appealed from be reversed, and that it recover its costs herein incurred.

¹ See *United States v. Three Barrels of Vanilla Tonka and Compound*, p. 356, *ante*.

Before PARDEE and SHELBY, Circuit Judges, and FOSTER, District Judge.

By the COURT:

This was a proceeding instituted by the United States under section 10 of the Food and Drugs Act of June 30, 1906, 34 Stat. 768, praying for the seizure and condemnation of three barrels of vanilla tonka and compound alleged to have been shipped from Chicago, Illinois, to San Antonio, Texas, and alleged to remain in San Antonio, Texas, in the original unbroken packages, where they were being offered for sale, and that the contents of said barrels were adulterated and misbranded within the meaning of the aforesaid act of Congress. In accordance with the prayer of the libel the three barrels aforesaid were seized at San Antonio. Appellee, Hudson Manufacturing Company, appeared as claimant of said goods and filed its answer denying the charge of adulteration and misbranding, denying that the goods remained at the time of seizure in the original unbroken packages, denying that they were being offered for sale, and alleging that the goods were not shipped in interstate commerce for sale, but were so shipped for manufacturing purposes solely.

On hearing in the district court a jury was waived and the matters of law and fact were submitted to the court. At the close of the evidence for the United States the court entered an order dismissing the proceedings on the ground that the evidence showed that the goods seized were not transported or shipped for sale, but were shipped for the purpose of being used in the manufacture of ice cream, and therefore not liable to seizure under said section 10, and on the further ground that the evidence failed to show a preliminary hearing was afforded to the party from whom the sample was obtained and an opportunity given him to be heard, as provided for in section 4 of said act.

From the order dismissing the proceedings as aforesaid the United States prosecutes this appeal, insisting that the trial court was in error, and the appellees move to dismiss the appeal on the ground that the proceeding in the court below was one at law and can only be reviewed in this court by writ of error.

The precise question has been dealt with in *Four Hundred and Forty-three Cans of Frozen Egg Product v. United States* [226 U. S. 172], No. 590 [3], on the docket of the Supreme Court, at the present term, in a decision handed down December 2d, 1912. In that case it is held that in seizures under the pure food act of June 30, 1906 (34 Stat. 768), and on land, the proceedings in the district court are at law, and that the circuit court of appeals are without jurisdiction to review the same on appeal. See *advance Sheets*, Supreme Court of the United States, December 2d, 1912.¹

The appeal in this case is dismissed.

¹ See p. 582, *ante*.

WM. M. GALT & CO. v. UNITED STATES.

(Court of Appeals, District of Columbia, January 6, 1913.)

N. J. No. 2396; Circular No. 70, Office of the Solicitor; 39 App. D. C. 470.

Whether a sample of a lot of flour seized is fairly representative of the lot, is a preliminary question for the trial court, and the decision then reached will not be revised in an appellate court unless the facts producing it are before the court—and then only when error clearly appears.

Appeal from the decree of the Supreme Court of the District of Columbia condemning and forfeiting 447 sacks of "Princess" flour and 72 sacks of "Fancy Melba" flour, found to be adulterated within the meaning of the Food and Drugs Act, section 7, paragraph 6, in the case of food. Affirmed.¹

[1]² ROBB, *Judge*. This is an appeal from a decree in the Supreme Court of the District condemning 447 sacks of "Princess Flour" and 72 sacks of "Fancy Melba Patent" flour, under a libel filed by the United States through its attorney in and for the District of Columbia. The libel sets forth the possession by the appellants within this District of "Three hundred and fifty sacks, more or less, of flour, labeled 'Princess Flour from Blanton Milling Co., Indianapolis, Ind.'; and further, fifty sacks, more or less, of flour labeled '140 lbs. Fancy Melba's Patent—Trade Mark Registered—From Choice Hard Wheat, Majestic Flour Manufacturing Co., U. S. A., Distributors'."

As originally filed the libel alleged that said flour was both adulterated and misbranded, in violation of the pure food act of June 30, 1906 (34 Stat. 768). [2] This averment was superseded by another which set forth that said flour is "adulterated within the meaning and intent and in violation of the said act of Congress approved June thirtieth, A. D. 1906, and that the said flour consists in part of a filthy, decomposed and putrid animal and vegetable substance." Appropriate answer was filed and, a jury being waived, testimony was taken in open court, the parties agreeing that the court might "find the facts and declare the law applicable thereto and render judgment accordingly." The court filed a written opinion which "was treated and considered by both court and counsel as the court's finding of facts as aforesaid." Thereupon the case was appealed to this court, the parties, according to the stipulation filed herein, "taking and considering the said opinion as and for such finding of facts."

The evidence which was before the trial court and upon which the decree is based is not in this record, and hence not before us. Searching the opinion of the trial court, we learn that the Government on two occasions, permission of the court first having been obtained, took two sacks of flour "one from each of said *two lots* described, for the purpose of examination and analysis." Appellants were granted the same privilege, but did not exercise it. We now quote from the opinion:

The result of the examination of the flour sacks taken by the Government as samples, was that one of them contained worms, insects, and beetles, aggre-

¹ Affirming *United States v. 350 Sacks of "Princess Flour" and 50 Sacks of "Fancy Melba Flour,"* p. 513, *ante*.

² Page numbers in brackets refer to the Notice of Judgment.

gating 3,525, and the other three, worms, insects, and beetles, aggregating 1,207, 1,448, and 1,959, respectively.

Experiments were made by the Department of Chemistry, showing that the said flour contained a large number of bacteria that were supposed to be injurious to the human body; and, in addition, to the worms, insects and beetles, that had been sifted out of the flour, the evidence showed that there remained in the same, cases or husks made by the worms, as well as the excreta from them, all of which, it was claimed, rendered the said flour filthy within the meaning of said act.

There were a great many weevils discovered, and they were defined as the grain weevil, or wingless insects, which require a period of some six weeks, in warm weather, for full growth and development, during which time they pass through four distinct stages of existence, first in the form of the egg, then the form of the larva, then in the pupa form, and finally reaching the adult form; and that after maturing, these insects might live for several months, and possibly for a year. In cold weather a longer time was necessary for their growth.

That the beetle known as "flour beetle," comes from a larva, or worm, about half an inch long, and it breeds in flour and grain. Several of these beetles, in the larva state, or in the adult state, appeared to be in said samples.

The evidence was that the flour was injuriously affected by the presence of such worms, insects, and beetles, by reason of their feeding on the gluten, and thereby destroying the strength and value of the flour, and rendering it unfit for making bread, or other domestic use, even if the foreign, filthy matter could be bolted or sifted out of it.

The court further found that it is not clear whether weevils may not come into flour while in storage, without any fault of the owner. Speaking of the sacks of flour here involved, the court said: "It appears that the flour sacks taken were from different locations in the several piles of sacks, and it is argued on behalf of the Government, that all the sacks seized were in a position to become affected by the dirt and filth from a stable near by." The court finally found "as matter of fact from the evidence that the said several sacks of flour are in a filthy condition, under the provisions of said act, by reason of the presence of the said worms, insects, and beetles, in such quantities as shown, and from the condition which they have produced in the said flour."

[3] The so-called Pure Food Act is entitled "An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors," etc. Section 7 defines adulteration of foods and drugs, respectively, as follows: In the case of drugs (1) if a drug differs from the standard strength, quality or purity, unless the actual standard be plainly stated upon the box or other container; (2) if its strength or purity fall below the professed standard or quality under which it is sold. In the case of confectionery, which the act defines as a food, if it contains any mineral substance or poison, color, or flavor, or other ingredients deleterious or detrimental to health, etc. In the case of food generally (1) if any substance has been mixed or packed with it so as to lower or injuriously affect its quality or strength; (2) if any substance has been substituted wholly or in part for the article; (3) if any valuable constituent of the article has been wholly or in part abstracted; (4) if it be mixed, colored, powdered, coated or stained in a manner whereby damage or inferiority is concealed; (5) if it contain any added poisonous ingredient which may render such article injurious to health; (6) *if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance*, or any portion of an animal unfit for food, whether

manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter.

Section 8 of the act covers misbranding. It is provided therein that no label shall bear any statement, design or device "which shall be false or misleading in any particular."

A most casual reading of this pure food act discloses that the purpose of Congress in its enactment was the better protection of the people of this country from adulterated or deleterious foods, drugs, medicines and liquors. It is the duty of the court, in interpreting such statutes, to keep constantly in mind the legislative intent, the evils sought to be overcome, and, if possible, to give substantial force and effect to that intent. *United States v. Corbett*, 215 U. S. 233; *United States v. Cella*, 37 App. D. C. 423. "It is the settled doctrine of this court," said Mr. Chief Justice Shepard in the *District of Columbia v. Gardiner*, present term, "that a liberal and reasonable construction shall be given these statutes in view of their remedial objects and purposes so as to effect the same."

The first contention of appellants in the present case is that the act makes a distinction between adulteration which consists in adding to an article that which is not properly a part of it, and adulteration existing when some part of the article itself is not what it ought to be; in other words, "when some part of the article, whether animal or vegetable, is filthy, decomposed, or putrid—not that the article contains a substance of that character foreign to its proper ingredients or constituents." In view of the finding of the court that the presence of worms, insects and beetles in the condemned flour have produced a filthy condition thereof, it is unnecessary to determine whether appellant's contention is well-founded. Aside from the fact that the evidence from which this finding was made is not before us, it is matter of common knowledge that the presence of such a large number of worms, insects and beetles in such a substance as flour would render the flour filthy in the general acceptance of that term. This flour was not to be fed to swine, but was to be sold for human consumption. Even conceding that the worms, insects and beetles could be separated therefrom, the flour would still be contaminated by reason of its contact with them, and it would still contain more or less husks and excreta from the worms—that is, it would still be filthy within the meaning of the act.

[4] Appellants further contend that there was no evidence of the condition of the flour actually condemned by the decree. Of course it is not contended that it was necessary for the Government to examine each of the large number of sacks of flour seized. The real contention, therefore, is that the samples examined were not representative of those remaining. 35 Cyc. 701 defines a sample as "that which is taken out of a large quantity as fairly representative of the whole." Whether a sample is fairly representative of the whole is a preliminary question to be decided by the trial court, and the decision then reached will not be revised in an appellate court unless the facts producing it are before that court—and then only when error clearly appears. *Brown v. Leach*, 107 Mass. 367. Of course, the situation may be such as to warrant the trial court in submitting this question to the jury. *Lake v. Clark*, 97 Mass. 347. In *Origet v. Hedden*, 155 U. S. 228, the point was made that the appraisers had examined cer-

tain cases only, out of two importations of a large number of cases of lace. The court said: "If there was a difference between the goods in the different cases of either importation, it is singular that the invoices are not set forth in the record. The inference is a reasonable one that they showed the goods in each importation to be of the same character and value, so that the examination of one case would be sufficient for all. There is nothing to indicate the contrary." The cases relied upon by appellants involved facts materially different from the facts in the present case, and in no way qualify the general rule previously stated.

Upon this branch of the case, the trial court found: "Considering *the testimony as presented*, and the absence of testimony on behalf of the claimants, the court is forced to the conclusion that if other samples had been taken and analysed, their examination would have shown similar conditions to those in the four sacks actually examined." The court further pertinently observed that, if the claimants could have shown to the contrary, it might be assumed they would have introduced evidence. It further appears from said opinion that the samples taken were "from each of said *two lots* described," and it further inferentially appears that all the sacks seized "were in a position to become affected by the dirt and filth from a stable near by." In view of what appears in the court's opinion as to the conditions surrounding the storage of this flour, the conclusion reached by the court from the testimony presented by the Government—which testimony is not before us—and the failure of the claimants to present any evidence upon the point, we are clearly of the opinion that the samples examined must now be presumed to have been fairly representative of the two lots of flour. The decree will therefore be affirmed and with costs.

Affirmed.

UNITED STATES v. 175 BOXES MACARONI.

(District Court, D. Massachusetts, January 9, 1913.)

N. J. No. 2959.

Macaroni *held* not misbranded in that the presence of artificial coloring matter was inconspicuously declared, and in that said macaroni was labeled and branded so as to purport it to be a foreign product, when not so.

Libel alleging violation of the Food and Drugs Act. Jury trial. Verdict for claimant. Libel dismissed.

STATEMENT OF FACTS.

This was a libel for the seizure and condemnation of 175 boxes of macaroni remaining unsold in the original unbroken packages at Boston, Mass. The libel alleged that the product had been shipped by the Atlantic Macaroni Co., Long Island City, N. Y., and transported from the State of New York into the State of Massachusetts, and charging misbranding in violation of the Food and Drugs Act. The product was labeled: "Macaroni Mosca Brand Artificially Colored Guaranteed by Manufacturer Serial No. 3880."

Misbranding of the product was alleged in the libel for the reason that said food, upon the packages and labels thereof, bore a certain statement, design, and device regarding the ingredients and substances contained therein, that is to say, the words "Artificially Colored" printed thereon in an inconspicuous manner, which said statement, design, and device was false and misleading in that by reason of said inconspicuous appearance of said words the purchaser would thereby be led to believe that said food did not contain artificial coloring matter, when in fact it did; and further in that said food, upon said packages and labels, bore a certain statement, design, and device regarding the ingredients and substances contained therein, that is to say, pictures of scenes portrayed upon each of said packages in similitude and likeness to pictures of a certain foreign country, to wit, Italy, which said statement, design, and device was false and misleading, in that it would lead a purchaser to believe that said food was of foreign origin, when in truth and in fact it was not of foreign origin.

HALE, *District Judge* (charge to the jury). A statute of the United States, called the Pure Food Law, provides "that it shall be unlawful for any person to manufacture within any Territory" of the United States "any article of food or drug which is adulterated or misbranded, within the meaning of" the act. It further provides, "that the term 'misbranded,' as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading." And it further provides that, if the article "be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so," it shall be deemed to be misbranded.

The Government in this case seeks to condemn 175 boxes of macaroni, which they say "have been transported from Long Island City in the State of New York, that is to say, from the Atlantic Macaroni Company at Long Island City, into the commonwealth of Massachusetts, to wit, at Boston in said district of Massachusetts, and remain in original packages at said Boston in the possession of parties to your informant unknown; that the food contained in said boxes is misbranded within the meaning of" this act of Congress, in two respects: First, that "the words 'Artificially colored' are printed thereon in an inconspicuous manner, which said statement, design and device was false and misleading, in that by reason of said inconspicuous appearance of said words a purchaser would thereby be led to believe that said food did not then and there contain artificial coloring matter, whereas it did;" and, second, that the label "contained pictures and scenes portrayed upon each of said packages in similitude and likeness to pictures and scenery of a certain foreign country, to wit, Italy, which said statement, design, and device was false and misleading, in that it would lead a purchaser to believe that said food was of foreign origin, whereas in truth and in fact said food was not of foreign origin."

The information proceeds, as I have said, against certain distinct things, namely, 175 boxes of macaroni.

A claimant appears, namely, the Atlantic Macaroni Company, and claims the goods. I do not think that it is necessary for me to read the claim and answer. It says that the goods are not misbranded; that, for the reasons set out, the goods contained in these boxes are entirely free from the charges in the information.

Now, gentlemen, these questions of fact are before this jury. Juries are to pass upon all questions of fact. In the Federal Court the jury is the judge of the facts; and, while the Court may express an opinion upon all questions of fact, it is the jury's opinion that prevails upon questions of fact; and if you think you discover in any way what the court thinks upon any question of fact, it is not the court's opinion that prevails upon a question of fact, but it is yours. On the other hand, it is the duty of the court to tell you what the law is upon the subject, and you ought to take the law from the court.

Now, I have said that the jury is to pass upon all questions of fact. You are the judges of what belief any witness produces in your mind. It is what conclusion you form, what belief you find in your mind, as the result of all the testimony in the case. You hear the testimony of each witness, and the probative value, as it is called, of his testimony, is for you to pass upon. And let me say that all questions of evidence, too, what a witness has said, is for you; and if I quote what a witness says I may do it in an incomplete and inadequate way; so that it is for you to say what the witness has said; and, as I have said before, it is for you to say what belief is induced in your minds, and what conclusion is produced by the testimony of the witness.

Now, the Government says, first, that the words "Artificially colored" were printed on the label involved in this case "in an inconspicuous manner, which said statement, design, and device was false and misleading, in that by reason of said inconspicuous appearance of said words a purchaser would thereby be led to believe that said food did not then and there contain artificial coloring matter, where-as it did."

Now, you have heard the testimony in the case. The Government says, first, that the goods contained artificial coloring matter. The burden of proof upon this issue, as upon all issues where the Government has the affirmative to show, is upon the Government. By "burden of proof" I mean, as an eminent author has put it, "the risk of non-persuasion." That is, if they do not persuade you that that is true, they fail.

Now, briefly, the Government says, on this question of artificial coloring matter, that the coloring matter in these goods was something more than a trace—it was an actual amount of coloring matter. They have put on an expert, who says that he made an examination of the stuff itself, and he has produced the results of the coloring matter on wool. He says that the coloring matter was of a harmless kind, was of a kind that has been passed upon by the Government as being of a harmless variety, but that there was enough coloring matter in it to color goods somewhat; and he has, as I say, produced a piece of wool that he says was colored by it. He says, further, that he does not know that it would have the same effect upon the macaroni that it would have upon the wool.

Now, the defense, the claimant, says that the coloring matter in the material was a mere trace, was of an inconsiderable amount, and it says that it came in this way, that in their vats they put material that contained harmless coloring matter for some trade—the Porto Rico trade, I think—and that sometimes, without washing the teeth of the vat, and cleaning out the vat entirely, they proceeded to put into the vat the material for the macaroni, a part of which we have in this case, and that a trace of the coloring matter that was in the previous batch remained in the vat, but not sufficient to be more than a mere trace.

Now, there is no issue in this case under section 7, subsection fifth, of the Food and Drugs Act of June 30, 1906, as it is not charged or claimed by the Government that there is any added poisonous or deleterious ingredient which may be injurious to health in the macaroni in this case.

The mere presence of a small amount, a trace, of harmless coloring matter, found by a chemist in food the natural color of which is not changed by such matter, when combined with the label in this case, is not a false or misleading statement, design, or device of anything in or about said food within the act.

The provisions in the act with regard to color are exclusive, and amount to a legislative declaration that if the color be harmless, the article genuine, and the color not to conceal inferiority or damage, nothing special need be on the label.

Now, then, gentlemen, your first question is whether, in fact, this article did contain coloring matter, anything more than a mere trace. I have told you what the Government says and what the claimant says. The burden is on the Government to satisfy you, by a fair preponderance of evidence in the case. If the Government fails to satisfy you, by a fair preponderance of evidence in the case, that there was coloring matter, more than a mere trace, then it fails on this proposition, and of course if there was no coloring matter there need not be anything on the label about it, and it would be unnecessary for you to come to the next question.

I say "preponderance of evidence." It is the duty of the Government to satisfy you, by a preponderance of the evidence; and I mean by that, gentlemen, any evidence that tips the scale in your mind. You come into this court, gentlemen, with your minds absolutely all in balance. You are to try the question of fact. Now, anything that tips the scale in your mind is called the preponderance of evidence. And let me say, gentlemen, these questions are very serious questions. The rights of the parties, the rights of the Government, and the rights of the claimant, are involved here; and the court has the same right to look to you for a perfectly fair passing upon each question of fact that you have to look to the court for the same judicial qualities. The jury, in other words, are as distinctly a judicial body as the court, and it is the duty of each one of you to take each question in its natural way, precisely as you would take any question in your own town, submitted to you by good neighbors, and pass upon it fairly and fully.

Now, if you come to the conclusion that the Government has met the burden of showing that there was a considerable amount of coloring matter in the material—that is, more than a trace—then you will come to the question of whether or not the Government is right in

its contention that the words "Artificially colored," printed on the label, were printed "in an inconspicuous manner, which said statement, design, and device was false and misleading; in that by reason of said inconspicuous appearance of said words a purchaser would thereby be led to believe that said food did not then and there contain artificial coloring matter."

Now, the label is before you. The issue upon that question is, Did the label—*does* the label—tend to mislead a reasonably intelligent man into believing that the goods were of a natural color, when in fact they were of an artificial color? Here the burden, too, is upon the Government. They produce the label; they say that the words "Artificially colored" are put upon the label in so inconspicuous a manner that they tend not to disclose, but to deceive; that is, that they are purposely put upon it in so undefined and inconspicuous a way that they do not attract attention, and that the effect of it is that it deceives a purchaser, an ordinarily intelligent man, naturally, into believing that the label is not upon goods which are naturally colored.

Now, the claimant says, on the other hand, that the words "Artificially colored" are in the ordinary place that you would look for them; that they are printed precisely like the other printing upon the label, as to which there is no pretense that there is any question of concealment; that they are printed in letters precisely like the letters in which the words "Guaranteed by manufacturer serial number thirty eight hundred and eighty" are printed; that they are printed in a clear type; and that, if anybody looks at the label as he would look at any label to read it, he would read the words "Artificially colored" precisely as readily as he would read the other printing upon the label; and that the words are printed precisely as a reasonable man would expect them to be printed.

Now, gentlemen, the question is for you. Has the Government satisfied you, by a preponderance of evidence, that those words are printed upon there in such a way as to have the effect upon a reasonably intelligent man of deceiving him into believing that the label signifies that the box contains goods of the natural color, instead of being artificially colored? The burden is upon the Government. If the Government fails, by a preponderance of evidence, to induce the belief in your mind that that label tends to deceive a reasonably intelligent man into believing that the goods are of the natural color, when in fact they are not, then you will find for the Government [claimant?]. If they have failed in that, then they have failed in that contention, and your verdict should be, in that respect, for the claimant.

They have one further contention, as I have said. They claim that the label itself bears a certain design and device, that is to say, "pictures and scenes portrayed upon each of said packages in similitude and likeness to pictures and scenery of a certain foreign country, to wit, Italy;" that said "design and device was false and misleading, in that it would lead a purchaser to believe that said food was of foreign origin, whereas, in truth and in fact, said food was not of foreign origin."

Now, the question for you to pass upon in that is a very simple, plain question of fact: Did the label tend to mislead a reasonably intelligent person into believing that the goods sold under the label

were of foreign origin? It is not a question of whether one person might possibly be misled by what he sees upon the label, but it is a question of the reasonable signification that the label in that respect would bear, as to whether the material is of foreign origin.

Here let me say that when a case is well tried by faithful and earnest and zealous counsel, as this has been, the court sometimes lets in evidence which does not assist the jury any on the whole in coming to a conclusion. I have thought it best, in this regard, to allow to come before the jury certain boxes upon which labels were pasted, because the labels were pasted upon them, and as a part of what Mr. Greenleaf calls "the setting of the case." But, so far as the testimony is concerned, you are to look to the labels, and not to the boxes. It is a question of the construction of the label. The statute does not require the place of manufacture to be stated on the label, if the label is not false or misleading in this respect. The claimant, as I have already told you, in regard to the boxes, has a right to use such words as have been referred to to indicate the shape or style on its boxes, if there is nothing there used which tends to deceive, and you must consider the label without reference to the boxes; that is, I mean by that, you have nothing to do with the boxes, as to whether they tend to deceive or not; it is the label which you are considering, and to which I confine your attention in that regard, and not the boxes.

The statute clearly does not require or permit the department to require that the place where an article is manufactured shall appear on the label.

The statute clearly does not require or permit the department to require that the name of the manufacturer of the article should appear on the label.

The statute is drawn in such a way as to expressly permit the omission of the name of the manufacturer and of the place of manufacture.

The issue, then, is left upon the label, clearly and distinctly. Does the label tend to mislead a reasonably intelligent person into believing that the goods sold under it were of foreign origin? Let us look at the label then.

Now, the Government says that that label represents, and is intended to convey to the mind of a purchaser, a reasonably intelligent man, that it is a foreign thing that he is looking at, and to get into his mind that that is a foreign product which is to be sold under that label. They say that there is something about the hills, the scene portrayed there, that indicates something about Italy, the Bay of Naples, and something about Italy; that there is something in the form of the trees that indicates an Italian tree, a Lombardy poplar, or some Italian tree; that there is something about the form and appearance of the peasantry, the boys and the girl, that indicates Italian peasantry; and that there is something, on the whole, as you look at the label, that clearly indicates, and is intended to indicate to the purchaser, that that label represents a foreign label, and that it deceives a person buying the goods into thinking that he is buying goods of foreign origin, and not of domestic origin. Has the Government met the burden of inducing the belief in your mind that that is so?

Now, the claimant says that not only is it not so, but that it is much more than true that the Government has not met the contention of showing that this label indicates a foreign product, because the claimant says that the label clearly indicates a domestic product, and the claimant's counsel points to certain labels. Now, the claimant says that it is generally true of foreign labels, labels that are clearly intended to represent goods that are a foreign product, that they have a volcanic hill, a peaked hill, with smoke issuing from it, and that the hills represented here in the label brought before you are flattened, and that they are distinctly different hills; that the difference is so conspicuous that any man must see at a glance that it is a different scene, that they are different hills—in other words, that it is an American view that is represented, that the hills represent what you would naturally expect in an American hill, and that the wheat field is represented as showing sheaves such as appear in America, and as do not appear in Italy.

The claimant says, further, that the label contains upon it what is not found, at least generally, in foreign labels; that it is not at all a foreign label so far as the guaranty of the manufacturer is concerned; and that the words "Mosca Brand" clearly are no designation by Italian words of an Italian brand, indicating that it is a brand made in Italy; that the English word "Brand" is used, whereas in the Italian labels Italian words are used; and that there is nothing in the label in question brought before you which tends to deceive, or would be likely to deceive, the average intelligent man into thinking that he was buying, under that label, a foreign product.

Now, here the burden is upon the Government. Have they, on the whole, induced the belief in your minds that this label is calculated to deceive a reasonably intelligent man into believing that that label signifies a foreign product? If you find, by a preponderance of evidence, that it is, then you find for the Government; if you fail to find, by a preponderance of evidence, that it is such, you find for the claimant.

Now, gentlemen, I think that I have given you as clearly as I can the questions of fact, which are very simple and very clear. The case has been tried with great clearness and ability, as I said. In many cases the court allows, sometimes more than it ought to, things to come into a case that do not assist the jury any in coming to their conclusions; and so it is the duty of the court to direct the attention of the jury, and direct it as clearly as it can, to the issues which are to be determined, which I have tried to do in this case. Now, gentlemen, the case has been well tried, and there is no reason why you should not agree very promptly upon the questions before you.

The verdict is in the form of questions to be answered by the jury. The questions are as follows:

1. Is the label such as to mislead a reasonably intelligent man into believing that the goods to be sold under it did not contain artificial coloring matter, when in fact they did?

2. Did the 175 boxes of macaroni in this case contain a substantial amount of coloring matter?

3. Is the label misleading in that the picture and scenes thereon are such a statement, design, and device as would lead a reasonably intelligent purchaser to believe that the goods sold under it were of foreign origin?

Under each of these questions is the word "Answer." The jury will direct their attention to each question, and decide whether the question shall be answered by "Yes" or "No." The foreman is to write the word "Yes" or "No," in accordance with what the jury shall find, after each question, and sign the verdict at the place indicated at the bottom of the paper.¹

The officer may attend the jury. The counsel will see to it that all exhibits go to the jury room.

UNITED STATES v. C. F. BLANKE TEA & COFFEE CO.

(District Court, E. D. Missouri, January 10, 1913.)

N. J. No. 2493.

A substitute for coffee labeled "Blanke's Kafeka" held not misbranded.

Information alleging violation of section 2 of the Food and Drugs Act by the interstate shipment from the State of Missouri into the State of Virginia, and on December 14, 1910, from the State of Missouri into the State of Louisiana, of quantities of a product called Blanke's Kafeka which was misbranded. The product in both consignments was labeled:

One Pound Blanke's Kafeka. The original malted grain coffee. A God-send for the Sick and Convalescent. A Nourishing and Health Giving Bread in Liquid Form. Manufactured by C. F. Blanke & Co. St. Louis, U. S. A. Blanke's Kafeka is the nearest approach to coffee ever put on the market. It has all the merits without any objectionable features. It makes a pleasant, healthful beverage, strengthens without stimulating, satisfies without shattering the nerves. Especially recommended for children. One Pound Blanke's Kafeka: The original Malted Grain Coffee. Nutritious, Palatable, Wholesome. A Health Food as well as a Table Beverage. Aids Digestion and makes Rich Healthy Blood. Manufactured by C. F. Blanke & Co. St. Louis, U. S. A.

Misbranding of the product in the first consignment was alleged in the information for the reason that the statements contained upon the package and label regarding the article and the ingredients and substances contained therein were false and misleading, and said product was labeled and branded so as to deceive and mislead the purchaser thereof and so as to lead a purchaser thereof to believe that the product was composed wholly of grains and cereals and was a substitute for coffee, whereas, in truth and in fact, the product contained and consisted of about 10 per cent of a low grade of coffee, including a considerable amount of coffee chaff and other refuse, and was not composed wholly of grains or cereals, but was a mixture of cereals, low-grade coffee, and coffee screenings. Misbranding of the product in the second consignment was alleged for the reason that the statements contained upon the package and label regarding the article and the ingredients and substances contained therein were false and misleading, and said product was labeled and branded so as to deceive and mislead the purchaser thereof and so as to lead a purchaser thereof to believe that the product was composed wholly of grains and cereals and was a substitute for coffee, whereas, in

¹ All of the interrogatories were answered by the jury in the negative.

truth and in fact, it contained and consisted of about 10 to 15 per cent of coffee tissues and was not composed wholly of grains or cereals, but was a mixture of cereals and coffee tissues.

Jury trial. Verdict of not guilty.

DYER, *District Judge* (charge to the jury). [2] This inquiry, in my opinion, is limited to a very narrow compass.

What appears upon these boxes or cartons appears in this information, and the information charges in each count substantially the same thing. I will read from the information what appears upon these boxes or cartons:

One Pound Blanke's Kafeka. The original malted grain coffee. A Godsend for the Sick and Convalescent. A Nourishing and Health Giving Bread in Liquid Form. Manufactured by C. F. Blanke & Co., St. Louis, U. S. A.

Blanke's Kafeka is the nearest approach to coffee ever put on the market. It has all the merits without any objectionable features. It makes a pleasant, healthful beverage, strengthens without stimulating, satisfies without shattering the nerves. Especially recommended for children.

[3] One Pound Blanke's Kafeka. The original malted grain coffee. Nutritious, Palatable, Wholesome. A Health Food as well as a Table Beverage. Aids Digestion and makes Rich Healthy Blood. Manufactured by C. F. Blanke & Co., St. Louis, U. S. A.

Then follow the directions upon each as to how to use it.

The information then charges that the statements I have just read, and which were contained upon said package and label, were false and misleading, and that the

said product was then and there labeled and branded so as to deceive and mislead the purchaser thereof in this: that said product is so labeled as to lead the purchaser thereof to believe that said product was composed wholly of grains and cereals and was a substitute for coffee, whereas in truth and in fact said product contained and consisted of about ten per cent (10%) of a low grade of coffee, including a considerable amount of coffee chaff and other refuse, and was not composed wholly of grains or cereals, but was a mixture of cereals, low grade coffee and coffee screenings.

That charge brings this case, as I have said, into very narrow limits. I am not going to comment upon the testimony given by the witnesses in this case. It is sufficient to say that the Government has introduced witnesses who have testified that the contents of these packages contained coffee and caffeine.

Upon the other hand, the defense shows by its own testimony that there is no coffee or caffeine in these packages. It has introduced here as witnesses the president and vice president of this defendant company. It has also introduced the miller, or the man who has charge of making this preparation.

You have heard the testimony of the Government's witnesses, saying that coffee is contained in these packages, and you have heard the testimony of the defendant's witnesses saying there is no coffee contained in the packages. If you find from the evidence in the case that, as charged in this information, coffee was used in this product, then it is misbranded within the meaning of the Food and Drugs Act. If you find upon the other hand, that there was no coffee and that coffee was not used in this product, then there is no misbranding of this article by the defendant company.

So at last the case is narrowed down to the question, Was there coffee used in this product, or was there not coffee used in this prod-

uct? If there was, as I have said, then this is a misbranding of the article contained in the packages. If there was no coffee in it, then it is not a misbranding of the article. In my judgment, that is all that is inquired into. You are not asked to go into the question of whether this is a good, bad or indifferent product. There is no charge of that kind. The charge is that in the branding of this article, the customer purchasing it would be misled or deceived by what appears upon the box or carton; that is, as is charged in this information, the purchaser would think it was wholly of cereal and not of coffee, and that it was a substitute, the nearest to coffee, that could be made.

It is for you to say which side of this testimony you will take as being true. If the Government's witnesses are right, and you believe their testimony beyond any reasonable doubt in the matter, then your verdict should be a verdict of guilty against this corporation. If, upon the other hand, you believe the statements made by the defendant and its employees, then your verdict should be not guilty, under this information.

This information, gentlemen, contains two counts and is a criminal information; that is to say, it charges a specific offense which is and must be considered criminal in its character. The burden of proof in this case, as in all cases of like character, rests upon the Government, and that burden does not shift during [4] the entire trial. It is still upon the Government to prove to your satisfaction, beyond any reasonable doubt, what is alleged in this information to be true, to-wit, that coffee was contained in these packages.

The defendant is presumed to be innocent and that presumption in this case, as in all cases of a criminal character, is to be maintained throughout the entire trial and until it is overcome by evidence that satisfies you beyond a reasonable doubt that the defendant is guilty. A reasonable doubt is such a doubt as would arise from all the testimony in the case, and such a doubt as would influence a man of ordinary business capacity in determining important issues.

If you are satisfied beyond any reasonable doubt that this defendant sent out these packages with the label on it that has been read in evidence, when in truth and in fact the product contained coffee, then, as I have said, your verdict will be in favor of the Government and a verdict of guilty against the defendant. If you are not satisfied beyond a reasonable doubt that this is true, then it is your duty to give the defendant the benefit of the doubt and return a verdict of not guilty.

That is all I can see in this case, gentlemen, and you may take the case, together with the indictment. The clerk has prepared a form of verdict which you may sign. If you find the defendant not guilty, insert the word "not" before the word "guilty" as contained in this form.

UNITED STATES v. C. F. BLANKE TEA & COFFEE CO.

(District Court, E. D. Missouri, January 11, 1913.)

N. J. No. 2797.

Coffee composed almost entirely of Santos coffee and labeled "Blanke's Mojav Coffee," held not misbranded as purporting to be a mixture of Moca and Java coffees.

Information alleging misbranding in violation of the Food and Drugs Act. Jury trial. Verdict of not guilty, by direction of the court.

On July 21, 1911, the United States Attorney for the Eastern District of Missouri, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against the C. F. Blanke Tea & Coffee Co., a corporation, St. Louis, Mo., alleging shipment by said company, in violation of the Food and Drugs Act, on or about December 14, 1910, from the State of Missouri into the State of Louisiana, of a quantity of coffee which was alleged to have been misbranded. The product was labeled: "Blanke's Mojav Coffee. The name Blanke is synonymous with good drinking coffee. A special blend of good drinking coffee put up ground, whole, or pulverized sold in fancy two-pound cans to give the consumer a set of handsome cans to retain for household use. Blanke's Mojav Roasted Coffee. Put up by the most complete coffee plant in the world. C. F. Blanke Tea & Coffee Co. Promoters of Good Goods. St. Louis, U. S. A."

Examination of a sample of the product by the Bureau of Chemistry of this Department indicated that it was a high-grade Santos, probably grading about a No. 2. Neither Mocha nor Java coffee was used in the product. It appeared that the product was all of one crop and not a blend as stated on the label. Misbranding of the product was alleged in the information for the reason that the labels thereon as above set forth created the impression and led the purchaser to believe that the product was a mixture of Mocha and Java coffee; that the word "Mojav" which appeared in large and conspicuous type upon the labels was compounded from the words "Mocha" and "Java" and led the purchaser to believe that the product was a mixture of Mocha and Java coffees, which are coffees of well-known grade and quality, when in truth and in fact it was another and different grade of coffee known as Santos and contained neither Mocha nor Java coffee; and it was further misbranded in that the labels upon the cans were false and misleading, and the product was so branded as to deceive and mislead the purchaser into the belief that it was Mocha and Java coffee, when in truth and in fact, it was composed almost entirely of Santos coffee, which is another and different grade of coffee; and the product was further misbranded in that it was an imitation of and offered for sale under the distinctive name of another article.

On January 11, 1913, the case having come on for trial before the court and a jury, after the introduction of testimony the following charge was delivered to the jury by the court:

DYER, *District Judge*. I am asked at the conclusion to give you a peremptory instruction.

This Pure Food Act, as it is popularly known, is one of the most important acts that has found its way upon the statutes, and where people violate it they should be punished, because the act itself is most admirable. But from all the testimony that has been offered in this case the court is not of the opinion that the Government has made out a case that calls for even consideration by the jury as to the guilt of this defendant.

The court, therefore, upon the whole case as made, gives you a peremptory instruction to find for the defendant, and one of your number will sign the verdict.

UNITED STATES v. DUNHAM MANUFACTURING CO.

(District Court, E. D. New York, January 17, 1913.)

N. J. No. 2413.

An article labeled "Shred Cocoanut" held adulterated because other substances, to wit, sugar and glycerin, had been substituted in part for the article, and misbranded because the statement "Shred Cocoanut" on the label purported it to consist wholly of shred cocoanut, when in fact it contained sugar and glycerin, the presence of which was not stated on the label.

Information charging violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

VEEDER, *District Judge* (charge to the jury). [2] I think you have gathered from the evidence and the arguments that the actual issue raised is a very simple one. I shall submit it to you in a very few words. The defendant corporation is charged with the offense of adulteration and misbranding an article of food in interstate shipment. The information contains four counts. You will remember that there were two shipments in evidence, one known as the Dannenhauer shipment, the other as the Dickinson shipment. Both were from New York to Camden, New Jersey. The defendant has admitted the interstate shipment, and the question before you is whether it is guilty of the offense prescribed in the act. You will probably find no reason to distinguish between the two shipments. Under each shipment there is an allegation of the offense of adulteration, and under each an allegation of misbranding. The first and third counts relate to adulteration, and the second and fourth relate to misbranding. That will probably suffice so far as the various counts in the information are concerned.

This indictment is based upon a salutary law known as the Food and Drugs Act. It is a rather extensive act, and covers a great variety of circumstances. But the general purpose of the act is to prevent the sale under misleading terms of foods and drugs. There are a great many specific provisions with which in this case you have nothing to do, and I shall now point out the material provisions. The first and third counts relate to adulteration. The act provides:

That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this act, is hereby prohibited; and any person who shall ship or deliver for shipment from

any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export the same to any foreign country,

is guilty of an offense.

Now this case relates to an article of food, and the act goes on to say:

That for the purposes of this act an article shall be deemed to be adulterated: In the case of food:

If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

You will observe that it is unnecessary to resort to a dictionary meaning of the term adulteration, because the act specifically prescribes what is meant by adulterated. The first and third counts are based on the second subdivision, which says: "If any substance has been substituted wholly or in part for the article." That, for the purposes of this case, is the definition of what adulteration is; and if you find beyond a reasonable doubt from this evidence that in these two shipments any substance was substituted wholly or in part for the article, then the defendant is guilty under those two counts.

[3] With respect to the second and fourth counts, relating to misbranding, the phraseology of the statute is somewhat different.

Section 8 provides:

That the term misbranded as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false and misleading in any particular—

it is unnecessary to read you what follows in that paragraph—and then it proceeds: "That for the purpose of this act an article shall also be deemed to be misbranded" in certain specific particulars, and one of them is in the case of food "if it be labeled or branded so as to deceive or mislead the purchaser."

You will observe how this differs from the section regarding adulteration. It specifies what should be deemed adulteration. But with reference to misbranding the statute says that it shall apply to all drugs or articles of food, the package or label of which shall bear any statement, or device, regarding the article or ingredients or substances contained therein, which shall be false or misleading in any particular; and then, after that broad phraseology, the statute goes on to specify that for the purposes of this act an article shall *also*—that is, in addition to what has gone before—be deemed to be misbranded in several particulars which follow. The only one that is material to this case is: if it be labeled or branded so as to mislead or deceive the purchaser. If you find beyond a reasonable doubt that this article of food was misbranded as defined in that statute then the defendant is guilty.

Now that is really all there is of this case. You have heard the evidence. There is little or no contest about the facts. It was tes-

tified by an officer of the defendant corporation that this cocoanut was imported in bulk; then the cover was taken off and it was shredded and mixed with sugar and glycerin. That is the finished product which has been exhibited to you. There has been some suggestion here that the term "shredded cocoanut" would signify to the purchaser that sugar and glycerin entered into its composition. Does that appeal to your judgment? You are to determine what the label means, and whether there is or is not an infraction of this statute. Does shredded cocoanut indicate anything more to your mind than cocoanut that has been shredded—that is, torn into shreds? Is there anything about the designation to indicate that anything else entered into its composition? The process of manufacture and the ingredients have been stated. The Government's chemist has testified that while there is a small percentage of sugar in cocoanut in its natural state, and slight traces of glycerin; but that the sugar appearing in the Dannenhauer shipment was 24.90 per cent and in the Dickinson shipment was 29.17 per cent; and that the glycerin in the former was 1.79 per cent and in the latter was 2.35 per cent.

You will bear in mind that the first and third counts relate to adulteration, and the second and fourth to misbranding. If you find the defendant guilty on all counts, your verdict will be a general verdict of guilty; if you find the defendant not guilty on all counts you will so specify.

LEXINGTON MILL & ELEVATOR CO. v. UNITED STATES. (TWO CASES.)

(Circuit Court of Appeals, Eighth Circuit, January 23, 1913.)

202 Fed. 615; N. J. No. 2549; Circular No. 71, Office of the Solicitor.

Flour bleached by the Alsop process *held* not adulterated or misbranded under the Food and Drugs Act.

Appeal from and in Error to the District Court of the United States for the Western District of Missouri.

Proceeding by the United States under section 10 of the Food and Drugs Act, by libel for the condemnation and forfeiture of 625 sacks of flour, Lexington Mill & Elevator Co., claimant. Judgment for libellant and claimant appeals and brings error. Appeal dismissed and judgment reversed on writ of error.¹

[617]² Before SANBORN, Circuit Judge, and WM. H. MUNGER and MARSHALL, District Judges.

MARSHALL, *District Judge*. The Lexington Mill and Elevator Company is a corporation of the State of Nebraska and is engaged in the manufacture of flour at Lexington, Nebr. On April 1, 1910, it shipped from Lexington to B. O. Terry at Castle, Mo., six hundred and twenty-five sacks of flour manufactured by it. On April 9, 1910, a libel was filed by the United States under the pro-

¹ Reversing *United States v. 625 Sacks of Flour*, p. 285, *ante*. Affirmed, *United States v. Lexington Mill & Elevator Co.*, p. 604, *post*.

² Numbers in brackets refer to pages of Federal Reporter.

visions of section 10 of the Food and Drugs Act (34 Stat. 768), and a warrant of seizure issued, by virtue of which the flour was seized under the claim that it was adulterated and misbranded in violation of the provisions of that act. The Lexington Mill & Elevator Company appeared as claimant. It averred that it had sold the flour under a guarantee that it was not adulterated within the meaning of the Food and Drugs Act, and that pursuant to that guarantee it had furnished to the purchaser other flour in lieu of that seized, and had become the owner of the flour in litigation. It was permitted to answer the libel, and the case was then tried to a court and jury with the result that the United States had a verdict that the flour was adulterated and misbranded. From the judgment of condemnation rendered on this verdict the claimant prosecutes an appeal and a writ of error. A motion is made to dismiss the appeal, and this must be sustained.

The act under which this libel was filed provides in section 10 for the process of libel for condemnation and that: "The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand a trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States." This did not change the essential character of the action or make it other than an action at law. As a matter of procedure it has to conform "as near as may be to proceedings in admiralty"; but a trial by jury at the demand of either party is provided, and a review of the facts so tried by appeal was not expressly granted. The question as to the proper method of review was decided in this court in the case of *United States v. Seven Hundred and Seventy-nine Cases of Molasses*, 174 Fed. 325, 98 C. C. A. 197. The Supreme Court of the United States has had occasion to pass on the principle involved in cases arising under the act of July 17, 1862, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels and for other purposes," which provided that the proceedings against the property seized shall be in rem and "shall conform as nearly as may be to proceedings in admiralty or in revenue cases." That court held that a writ of error was the only method of review. The appeal in No. 3534 will be dismissed and jurisdiction will be taken of the writ of error in No. 3533.

Before a consideration of the questions arising on the writ of error a more complete statement of the facts is necessary. The claimant in the manufacture of the flour seized uses the Alsop patented process. A complete description of this process may be found in the [618] opinion of this court in *Naylor v. Alsop Process Co.*, 168 Fed. 911, 94 C. C. A. 315. It is sufficient for the present purpose to say that by it nitrogen peroxide gas is formed by electric discharges. This gas mixed with air is brought into contact with the freshly milled flour, with the result of bleaching it. The method is this: In a small chamber one electrode is fixed; the other is given a reciprocating motion so as to alternately touch and separate from the fixed electrode. A current of high potential is used. The circuit is completed by the contact. Separation of the electrodes results in an arc. The inert nitrogen of the air is oxidized and nitrogen peroxide gas formed. This gas diluted by mixture with air is conveyed to a box or agitator, through

which the flour is permitted to fall, and the bleaching is at once effected. The chemical reaction seems to be as follows: The nitrogen peroxide gas, coming in contact with the moisture of the flour, splits and forms nitric and nitrous acids, both oxidizing agents, but the nitric acid the more powerful. The nitric acid certainly and the nitrous acid probably unite with the coloring matter of the flour and bleach it. Nitrites are formed by the union of the nitrous acid with the bases in the flour and nitrates by the union of the nitric acid with those bases. The nitrates may be disregarded as noninjurious; the nitrites are claimed to be poisonous. The flour seized was subjected to the Griess-Ilsovay test, an extremely delicate test for the detection of the presence of nitrites, and was shown to contain nitrites or material reacting as nitrites to the amount of three parts per million. The misbranding is predicated on this. The sacks containing the flour were labeled "L 48, Lexington cream XXXXX, fancy patent. This flour is made of first quality hard wheat." In fact, the flour was milled from Turkey red wheat. This wheat replanted from year to year gradually degenerates and becomes mixed with a wheat of a yellow color, called locally "yellow berry." This admixture with yellow berry deteriorates the quality of the wheat. The wheat in question contained this yellow berry to the extent of from fifteen to twenty-five per cent of its total quantity. Both Turkey red and yellow berry are hard wheats. This wheat graded as No. 2, and this was the best grade of wheat grown or milled in Nebraska or neighboring States. In other sections of the country wheat grading as No. 1 is grown. There can be milled from the same wheat flour of different grades. That flour which contains the entire flour content of the berry is called "straight flour"; patent flour excludes a part of the flour content; that part of the berry nearest the bran coat containing the greater part of the oil and coloring matter. Clear flour is the residue of the flour content of the wheat after taking out the patent flour. The result is that patent flour is whiter than straight and straight is whiter than clear flour.

The jury found separate verdicts: (1) that the flour seized was adulterated; and (2) that it was misbranded. The court charged the jury:

It is clear that it was intended by Congress to prohibit the adding to the food of any quantity of the prohibited substance. The fact that poisonous substances are to be found in the bodies of human beings, in the air, in potable water, and in articles of food such as ham, bacon, fruits, certain [619] vegetables, and other articles does not justify the adding of the same or other poisonous substances to articles of food, such as flour, because the statute condemns the adding of poisonous substances. Therefore the court charges you that the Government need not prove that this flour or food stuffs made by the use of it would injure the health of any consumer. It is the character, not the quantity, of the added substance, if any, which is to determine this case.

This was excepted to and was assigned as error. There was evidence tending to prove that flour containing the percentage of nitrites found in the seized flour might be injurious to health when used as a food for a considerable period, but this was disputed, and the converse supported by substantial testimony. This was the most stubbornly contested issue in the case, and that it was an issue was recognized by the Government at all stages of the trial.

The part of the statute material to a consideration of the correctness of this instruction is found in section 7 of the act, which reads:

SEC. 7. That for the purposes of this act an article shall be deemed to be adulterated: * * *

In the case of food:

First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

Second. If any substance has been substituted wholly or in part for the article.

Third. If any valuable constituent of the article has been wholly or in part abstracted.

Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

Fifth. If it contain any added poisonous or other added deleterious ingredients which may render such article injurious to health * * *.

The instruction complained of referred to the charge in the libel under the fifth subdivision just quoted. The trial judge decided that if the added substance was qualitatively poisonous, although in fact added in such minute quantity as to be non-injurious to health that it still fell under the ban of the statute; and the distinction is sought to be drawn between substances admittedly poisonous when administered in considerable quantities but which serve some beneficial purpose when administered in small amounts, and those substances which it is claimed never can benefit and which in large doses must injure. The distinction is refined. To apply it must presuppose that science has exhausted the entire field of investigation as to the effect upon the human body of these various substances; that nothing remains to be learned. Otherwise the court would be required to solemnly adjudge today that a certain substance is qualitatively poisonous because it can never serve a useful purpose in the human system only to have this conclusion made absurd by some new discovery. There is no warrant in the statute for such a strained construction. The object of the law was evidently (1) to insure to the purchaser that the article purchased was what it purported to be; and (2) to safeguard the public health by prohibiting the inclusion of any foreign ingredient deleterious to health. *Hall-Baker Grain Co. v. United States* (C. C. A.), 198 Fed. 614. The statute is to be read in the light of these objects, and the words "injurious to health" must be given their natural meaning. It will be observed that this paragraph of the statute [620] does not end with the words "added deleterious ingredient"; but, as a precaution against the idea embodied in the instruction complained of, it says "which may render such article injurious to health." Without these latter words it might, with more force, be argued that deleterious and beneficent ingredients are to be divided into two general classes independent of their particular effect in the actual quantities administered, but the possibility of injury to health due to the added ingredient and in the quantity in which it is added is plainly made an essential element of the prohibition. The investigation does not stop with the consideration of the poisonous nature of the added substance. It is added to the article of food, and the statute only prohibits it if it may render such article—the article of food—injurious to health.

In *French Silver Dragee Co. v. United States*, 179 Fed. 824, 103 C. C. A. 316, this question was considered by the Court of Appeals of the Second Circuit. In that case adulteration was charged in confec-

tionery by the addition of silver. The article in question was made of sugar and thinly coated with pure silver. The statute declares that confectionery shall be deemed to be adulterated "if it contain terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt or spiritous liquor or compound or narcotic drug." The element of injury to health is not expressed as a qualification of mineral substance. Silver is admittedly a mineral substance, and the act of the defendant was within the letter of the prohibition, but the court, construing the statute in the light of the evils it was intended to remedy, the objects sought to be accomplished, held that there was implied in this clause relating to confectionery the very limitation expressed in the paragraph relating to food, and, as there was no proof that the coating of silver might render the article injurious to health, it did not fall within the ban of the statute. It was there said: "Stated in another way we think that the history of the act, the objects to be accomplished by it, and the language of all its provisions, require that it should be so interpreted that in the case of confectionery, as in the case of foods and drugs, the Government should establish with respect to products not specifically named that they either deceive or are calculated to deceive the public or are detrimental to health."

In *Friend v. Matt*, 68 J. P. 589, there was under consideration Sec. 3 of 38-39 Victoria, Chap. 63, which reads: "No person shall mix, color, stain, or powder or alter, or permit another person to mix, color, stain or powder any article of food or any ingredient or material so as to render the article injurious to health." In that case the respondent was charged with selling preserved peas, the color of which had been retained by the addition of sulphate of copper. It was contended that, as sulphate of copper in substantial quantity was injurious to health, the peas so treated with it were within the statute even if the treated peas were not injurious to health. This view prevailed in the trial court, but the judgment was reversed on appeal; Lord Alverstone, Chief Justice, saying: [621] "I have no doubt that, in order to convict under section 3, the article of food must be shown to be injurious to health by the addition of some ingredient."

The instruction complained of eliminated a consideration of any possible injurious effect from the use of the flour as an article of food, and was erroneous. We are not unmindful of the contention that the evidence conclusively shows that flour subjected to the bleaching process is injurious to health in some degree, even if its injurious effect is so slight as to be incapable of observation, and that hence the instruction we have found to be error was error without prejudice. This contention is founded upon expert testimony as to the result from the taking of nitrites into the human system. It is said that nitrites taken into the human body act upon the coloring matter of the red corpuscles of the blood so as to change the hemoglobin of the blood into methemoglobin. In the language of one of the chief chemical experts of the Government this effect is thus described:

In the blood stream there are red corpuscles, invisible to the naked eye, which contain a red coloring substance known as hemoglobin, when not combined with oxygen, and when combined with oxygen forming a dissociable compound, oxyhemoglobin. In respiration, the hemoglobin contained in the

red corpuscles of the venous blood is brought into the lungs, where it having an affinity for the oxygen, which is one of the gaseous constituents of the air, combines with the oxygen to form oxyhemoglobin. This oxyhemoglobin contained in the red blood corpuscles is then conveyed, through the arterial system, to the various parts of the body, and of the terminals of the arterial system, passing through a mass of tissue, it gives up its oxygen, to oxidize the tissues, or materials that may be in solution there, to form carbon dioxide, and to form water, and this oxyhemoglobin is thereby reduced to the condition of hemoglobin which is returned by the venous system to the lungs, to be again oxygenated. That is where the hemoglobin will again combine with oxygen to form oxyhemoglobin, and a given quantity of hemoglobin may serve to carry a given quantity of oxygen to the system. Now, however, if any of this hemoglobin is converted into methemoglobin, which is a compound of oxygen with hemoglobin, in which the oxygen is more firmly combined than in the case of oxyhemoglobin, although the quantity of oxygen is the same, the oxygen is so firmly attached—combined with the hemoglobin—that the vital processes are not sufficiently strong to separate the oxygen from the hemoglobin, nor to use the oxygen to oxidize the tissue and tissue material, to sustain life, and, consequently, it passes through the circulation to the arterial system and the venous system, and continues this cycle until, finally, it is destroyed by the liver. Therefore, a certain quantity of the hemoglobin is rendered inefficient. It no longer functionates as a carrier of oxygen to the system, serves, or acts, as a foreign body in the blood circulation, and, therefore, must be removed. As I have said before, an extra strain is placed upon the liver, in order to remove it, and an extra strain is placed upon the red blood marrow, in adults, to regenerate the corpuscles, and to replace the corpuscles of the hemoglobin that have been rendered inactive by the action of nitrite, and the formation of methemoglobin.

It is also said that the continued presence of nitrites in the system does not develop any tolerance on the part of the body or means of neutralizing its normal action. On the other hand, it was proved that no injurious effect had ever been observed from the use of bleached flour, although such flour had been largely used; that nitrites in some or greater amounts are frequently present in potable water, bacon, [622] ham, fruits, and certain vegetables, and even in the saliva of both adults and children, and no evil result has been detected; that urea usually present in saliva is, when taken into the stomach, a neutralizer of nitrites, and is a method by which nature averts harm from minute quantities of nitrites so constantly taken into the system. In this conflict of evidence it was essentially a matter for the jury to find the fact under proper instructions. Expert testimony is but evidence. In case of dispute the controversy cannot be settled by the judicial knowledge of the court. *U. S. v. McGlue*, 1 Curtis, 1-9, Fed. Cas. No. 15679; *U. S. v. Molloy* (C. C.), 31 Fed. 19. It cannot be held that the evidence was so conclusive in favor of the Government as to warrant the court in withdrawing this issue from the jury.

The Government also claimed that the seized flour was adulterated within the first and fourth subdivisions of section 7 before quoted, in that a substance, viz., nitrites or nitrite reacting material, had been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength, and that it had been thereby colored in a manner whereby damage or inferiority was concealed. The claimant requested a peremptory instruction in its favor on the issues so tendered by the libel, and assigns the refusal to so instruct as error.

The mixture referred to in the first subdivision must be held to include a chemical compound as well as a mechanical mixture. While

this does not accord with the scientific definition of a mixture, yet in common acceptation mixtures and compounds are not discriminated. The evil intended to be remedied by the statute is not limited to a mechanical mixture, but is just as potent when the chemical union results from the two substances with the deleterious effect intended to be prevented by the act. Similarly, the word "colored" must be held to include any artificially produced change in the natural color of the substance "in a manner whereby damage or inferiority is concealed," even if the change is, as in this case, a removing of color. This is the evident intent of the statute. The act is essentially remedial, and its evident purpose is not to be defeated by any narrowness of construction. *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363. There was evidence that bleached flour did not improve with age in the manner characteristic of unbleached flour, nor did it, as the claimant contended, suddenly take on the condition of properly aged flour which had not been subjected to the bleaching process. That in dough made from bleached flour the gluten never attained the toughness found in dough from unbleached and properly aged flour, and that this toughness was a valuable property in the making of bread. In other words, that as an ultimate result of the mixing of the flour with nitrogen peroxide gas the bread-making quality had been injuriously affected. We are not concerned with the opposing testimony. It was for the jury to determine the fact, and the court did not err in refusing to peremptorily instruct for the claimant so far as the claim of adulteration was based on the first subdivision before quoted.

[623] The claim of adulteration under the fourth subdivision presents a different question. There is evidence that flour made from new wheat is darker in color than the flour made from wheat which has gone through an incipient fermentation or sweating process in the stack, and second, through a similar process after threshing. This involves time; also, that freshly milled flour is darker than it subsequently becomes when kept for a certain period of time. That clear flour is darker than straight flour and straight flour is darker than patent flour; that color is to some extent an index of the quality of the flour, and as such influences the ordinary purchaser; that all grades of bleached flour are whiter than unbleached. In this way the index of color becomes unreliable and a purchaser may take the bleached straight for unbleached patent flour. With the evidence on which the inferiority of the bleached flour is claimed, this, it is contended, brings the case within the fourth subdivision of section 7. Opposed to this, it appears: That color is at best an uncertain index of quality, and that dealers in flour use other means to ascertain quality. That the color of bleached flour is distinct from that of unbleached flour; the dead white of the bleached is contrasted with the cream white of the unbleached. That bleaching of flour does not obliterate the differences in appearance of different grades of bleached flour. That, while patent flour obtains a higher price in the market than straight flour, this is not due to any superiority in patent flour from a nutritious standpoint, but is due to the fact that bread baked from it is whiter in appearance, and hence more pleasing to the eye. This esthetic result can be obtained by a certain process of conditioning the wheat and milling the flour. Was it the intention of the statute that this process should have a monopoly? Whiteness in flour

is a desirable end in and of itself. Its connection with flour of any particular grade is purely incidental. We are not persuaded that by the bleaching process flour is so colored as to conceal inferiority, or that by it flour is adulterated within the intent of subdivision four of section 7 of this act.

The court submitted to the jury the charge contained in the libel that this flour was misbranded, and in effect instructed the jury that they should find for the Government if the flour was not a patent flour or was not made from first quality hard wheat. This was excepted to and is assigned as error. The contention of the plaintiff in error, as presented to the trial court by various requests for instructions, is that no evidence was introduced tending to prove that the seized flour was not a patent flour, and that the issue tendered by the libel as to the quality of the wheat only went to the question whether it was hard or soft wheat, and that there was no evidence that the wheat was soft. It will serve no useful purpose to review at length the evidence. It suffices to say that it appears that the seized flour contains 90 per cent of the flour content of the wheat; that there is no fixed standard as to the percentage of the flour content which may be properly termed patent flour. When the process first originated, a relatively low percentage was called patent flour; as improvements were made in the methods of manufacture, a higher percentage was customarily so labeled. Different mills adopt different standards [624], varying in accordance with the efficiency of their methods of manufacture. The quality of the wheat milled also enters into the question. The better the wheat the higher the percentage of the flour content that may properly be classed as patent flour. The case of the Government rests entirely on the evidence of some millers that in their opinion no greater percentage than 85 per cent can be properly classed as patent flour. This evidence is based upon the experience of those witnesses with different machinery and wheat, and is not predicated upon the claimant's methods of manufacture. There is a concurrence of the witnesses that the term "patent flour" does not connote any fixed or maximum percentage of the flour content of the berry. In other words, by "patent flour" is meant flour containing less than the total of the flour content of the wheat. Giving those words that signification, there was no evidence of falsity, and the claimant was entitled to have that issue withdrawn from the jury by a peremptory instruction in its favor.

It was charged in the amended libel that the seized flour was misbranded in that it was labeled as made of the first quality of hard wheat, whereas, in truth it was made in whole or in part of soft wheat. This charge was denied in the answer. The evidence adduced in its support is that the flour was milled from No. 2 Turkey red wheat and was not of the first quality, but that no soft wheat entered into its composition. The trial court, in substance, instructed the jury that if the wheat was not of the first quality the charge of misbranding was sustained. Fairly construed, the libel tendered the issue of soft wheat as distinguished from hard wheat. The pleader assumed that it was incumbent upon him to specify the particular in which the branding was false. If it be permissible to so specify and failing to support the specification, to prove falsity in another particular within the general averment of falsity, then the specification serves but to draw the attention of the defendant

from the actual point of controversy and to mislead. It was error to submit the charge of misbranding to the jury.

Errors are assigned on various rulings in the admission of testimony; but as the pages of the record which presented the testimony objected to are not stated in the brief of the plaintiff in error, as required by rule 24 of this court, we deem it unnecessary to consider them. *Hoge v. Magnes*, 85 Fed. 355-358, 29 C. C. A. 564.

The constitutionality of the Food and Drugs Act is attacked by the plaintiff in error and was exhaustively argued. The point of the attack is that the statute as construed by the trial court applied to food products in fact entirely innocuous and which could not possibly be injurious to health nor deceptive. As we have not so interpreted the statute, it is not necessary to express any opinion as to the validity of a statute excluding from interstate commerce harmless food products which are offered for sale without deception.

The judgment below must be reversed, and the case remanded for a new trial, and it is so ordered.

PHILADELPHIA PICKLING CO. v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit, January 31, 1913.)

202 Fed. 150; N. J. No. 2456.

Held that the shipment of an adulterated article of food from one State to another for the purpose of testing the article, was a shipment in interstate commerce and constituted a violation of the Food and Drugs Act, even though the shipper was also the consignee.

In Error to the District Court of the United States for the District of New Jersey.

The Philadelphia Pickling Co., plaintiff in error, was convicted in the district court for violation of the Food and Drugs Act, and brought error. Affirmed.

At the trial of the case the jury was directed to find a verdict in favor of the Government, as will more fully appear in the following charge¹ delivered to the jury by the court.

RELLSTAB, *District Judge*. The question now before the court is whether the defense that the defendant has been permitted to introduce, is an answer to this indictment, it having been admitted by the defendant, first, that the nine barrels of tomato paste, which constitutes the shipment, contained adulterated food within the meaning of the Food and Drugs Act; and second, that it shipped them from Belleplain, New Jersey, to itself at its place of business in Philadelphia, Pennsylvania.

As I say, the question is whether, in view of those admissions, the defense that has been permitted to be introduced can be treated as a defense in law. If it can, it presents a question for the jury. If not, there is no question for the jury to pass upon, and it devolves upon the court to direct a verdict.

The view I have reached in the premises is that it does not constitute a defense, and I will briefly state my reasons, so that if the case

¹Not published in Federal Reporter. See N. J. No. 2456.

should be taken up, the appellate court will know upon what grounds the defense was overruled.

The indictment contains but one count, and that charges the defendant, the Philadelphia Pickling Company, with wilfully and unlawfully shipping and delivering for shipment from Belleplain, New Jersey, to Philadelphia, Pennsylvania, by a certain railroad, nine barrels of tomato paste, which, the indictment alleges, was a food adulterated within the meaning of the Food and Drug Act. It then specifies in what way it was adulterated. This act, as indicated in its title, is an act to prevent not only the manufacture and sale, but the transportation of, adulterated or misbranded foods and drugs, etc. Transportation as well as sale or manufacture, is therefore, within the congressional purpose in passing this enactment. Section 2 prohibits the introduction into any State from another State, of adulterated foods; or even the delivery for shipment from one State to another, and it declares the persons who shall so introduce and transport, to be guilty of a misdemeanor.

Section 10, to which reference has been made, authorizes a proceeding in rem, and contemplates only the confiscation of the offending goods. Section 2, upon which the indictment is founded, directs a proceeding in personam, and the constituents of the offense therein denounced are found therein, no reference to section 10 being necessary.

It is said, however, that the shipment in question, though made with the view of sale, depended upon an inspection and test before a sale could take place, and therefore was not an offense within such section. In other words, that such a transaction was not commerce, and therefore not within the legislative purpose of the act. I can not accede to this view. The defendant certainly contemplated making a sale of this paste. The examination and test were for that purpose; that the result thereof might prevent the consummation of the intended sale does not make this shipment any less a commercial transaction. The purpose of this act is very manifest, it is a beneficent purpose; it is to protect the public from the sale of impure food. The act itself furnishes the test of what is impure. Transportation with a view of putting into the hands of customers an adulterated article, is within the beneficent purpose, and within the terms of this enactment.

Now, it appears in this case that the defendant purchased in New Jersey, from a New Jersey manufacturer, a number of barrels of tomato paste, which it stored in its own place in New Jersey. The testimony on behalf of the defendant discloses not only that, but also that they knew at that time that it was adulterated within the meaning of this act, and that if such food should come into interstate commerce, it would fall within the denouncement of such act, subject the defendant to indictment, and the goods themselves to confiscation.

The proviso to section 2, to which reference has been made, shows that Congress intended to except from the provisions of the act such articles, even though they were adulterated within the meaning of the act, where it was intended for export to a foreign country; but it expressly limits the proviso, and requires the persons so intending to use the adulterated food, to see that it is put in packages prepared and packed according to the specifications or directions of the foreign

purchaser; that was not done in this case. The reason given why it was not done is that without an examination and test no such exportation was to take place, and that the prospective purchaser would not go to New Jersey to make the inspection, and that the goods were thereupon shipped to Philadelphia to have the examination and test made there. We find, therefore, that a shipment was made of adulterated goods from one State to another. It is said it was made, however, from the owner to himself, the shipper and the consignee being the same person, and that from that we are to conclude that it was not commerce. I do not think the cases cited by counsel will support that insistence. Furthermore, it must not be overlooked that all those cases were dealing with section 10, seizures in which the element of sale is expressly inserted. It may very well be that a person can not sell to himself; yet, a shipment by one to himself may be in contemplation of sale and fall within the statute's inhibition. If Stevens, the original owner, had shipped these goods direct to the defendant at Philadelphia, there would be no question but that it would be a shipment in interstate commerce. Will the mere fact that the purchase was made in New Jersey and shipped by the purchaser to himself in another State, take the transaction out of the act? To put such construction upon this section seems to me to be violative of the ordinarily accepted principles of statutory construction. This section declares that introducing from one State to another, shipping from one State to another, delivering for the purpose of shipping from one State to another, an article of food which is adulterated, is a misdemeanor. As already stated, these nine barrels of adulterated tomato paste were intended to be sold, and that with a view of facilitating and consummating such sale, the shipment was made from New Jersey to Pennsylvania. It would have been consummated, according to their own statement, if the goods had upon inspection and examination by the intended purchaser proved to be satisfactory to him. To hold that a shipment of that kind is not commerce, in my judgment, would be in absolute disregard of the meaning of the word. The defendant, if it had intended to make a shipment of these barrels under this proviso which I have mentioned—the proviso tacked on to the second section—should have made its inspection and examination in New Jersey and should there have prepared and marked the containers in the manner directed by the statute. It did not do that; but on the contrary, it made the shipment in disregard of such requirement, and hence, in violation of the section.

My direction, therefore, to you gentlemen is that you find a verdict in favor of the Government.

On January 2, 1913, the case was argued in the Circuit Court of Appeals and on February 1, 1913, that court rendered its decision, affirming the judgment of the lower court.

[150]¹ Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, *Circuit Judge*. The Philadelphia Pickling Company was convicted under section 2 of the Food and Drugs Act of [151] 1906, the indictment charging a shipment of adulterated

¹ Numbers in brackets refer to pages of Federal Reporter.

tomato paste from the company's place of business in New Jersey to its place of business in Pennsylvania. Other facts will appear in a few moments; but it seems advisable to consider in advance the general question: Does the act apply where the owner has shipped to himself for some other business purpose than sale? The trial judge directed the verdict, but no complaint is made of this, if his construction of the act was correct.

The statute imposes penalties in three sections, but we are concerned only with sections 2 and 10. The latter section provides for condemnation, and permits an offending article to be seized, if it—

is being transported from one State, Territory, District, or insular possession to another for sale; or having been transported remains unloaded, unsold, or in original unbroken packages; or if it be sold or offered for sale in the District of Columbia, or the Territories, or insular possessions of the United States; or if it be imported from a foreign country for sale; or if it is intended for export to a foreign country.

This section speaks repeatedly of sale, and the courts have had several occasions to consider what Congress meant by the language quoted. In *United States v. 65 Casks* (D. C.) 170 Fed. 449, it appeared that the casks in question (which were insufficiently marked) contained a liquid that had been manufactured and shipped by the owner's agent in Michigan to the owner himself in West Virginia for the primary purpose of being bottled and properly labeled there. It was not to be sold until this had been done, and the district court held *inter alia* (pp. 445, 446) that Congress—

did not * * * have power to restrict one from manufacturing in one State such product and removing it from that State to another for the purpose of personal use and not sale, or for use in connection with the manufacture of other articles to be legally branded when so manufactured.

The court of appeals affirmed the judgment in a brief opinion (175 Fed. 1022, 99 C. C. A. 667), which is silent concerning the power of Congress, and merely gives the following reason for affirmance:

No attempt to avoid the law, either directly, indirectly, or by subterfuge, has been shown; it appearing that the manufacturer had simply transferred from one point to another the product he was manufacturing for the purpose of completing the same for the market. Under the circumstances disclosed in this case, having in mind the object of Congress in enacting the law involved, we do not think the liquid extract proceeded against should be forfeited. Reaching this conclusion, we do not find it necessary to consider other questions discussed by counsel and referred to in the opinion of the court below.

In *United States v. 46 Packages* (D. C.) 183 Fed. 642, it was held that a libel in rem under section 10 was defective because it failed to aver that the articles seized were transported "for sale." The foregoing cases are referred to in *Hipolite Egg Co. v. United States*, 220 U. S. 45, 31 Sup. Ct. 364, 55 L. Ed. 364, and although they are not definitely disapproved they are certainly not accepted as correct. At the best, they are noticed with a word or two of comment, and of course they must yield if they clash with the decision or the opinion of the Supreme Court. One of the points decided in the *Hipolite* case [152] is that section 10 permits the condemnation of adulterated food, although it has not been transported for sale directly, but is intended solely for use as raw material in the manufacture of another product. This is clear, for the court on page 52 of 220 U. S., on page

365 of 31 Sup. Ct. (55 L. Ed. 364), states the first contention of the egg company to be that:

Section 10 of the Food and Drugs Act does not apply to an article of food which has not been shipped for sale, but which has been shipped solely for use as raw material in the manufacture of some other product.

and this contention is declared (p. 55 of 220 U. S., on page 366 of 31 Sup. Ct. [55 L. Ed. 364]) to be "Untenable."

But the reasoning that supports this declaration goes further, we think, than the precise point decided. We may perhaps venture to give an outline of the argument: Congress has taken away from adulterated food the right to be transported in interstate commerce, whatever the object of such transportation may be. The act has two clearly separate objects (220 U. S. 54, 31 U. S. 364, 55 L. Ed. 364): first, to keep adulterated articles completely out of the channels of interstate commerce; and, second, if they do enter such channels, to sanction their condemnation while being transported, or even after they have reached their destination, as long as they remain unloaded, unsold, or in original unbroken packages. These objects of the act are not changed or qualified by the purpose of the owner. He may, or may not, intend to sell. If he so intend, perhaps he may also intend that the articles shall first undergo a further process of manufacture; but, even if the latter intention be present, he would still be transporting for sale. Therefore, even if the "condition" [contention?] be accepted that section 10 does not allow condemnation unless such articles are transported for sale, nevertheless the facts of the case then being considered showed that a "sale" was intended. Not directly, it is true, but only one step removed; for the eggs were intended to be used in making cakes for the market, and were therefore to be sold as a part of the cake. The court points out that all articles, compound or single, not intended for consumption by the producer, are designed for sale, and because they are so designed it is the concern of the law to have them pure.

One of the egg company's arguments—that a producer in one State is not interested in an article shipped from another State, if such article be not intended for sale or consumption until it is manufactured into something else—is said to be "peculiar." The court declares, that both the producer and the consumer are interested in having an article pure, no matter whence it may come, and that the law seeks to protect such interest both by the personal penalties of section 2 and by the seizure and condemnation under section 10.

This is in outline the court's reply to the egg company's first position; but we think the attitude of that tribunal appears even more clearly in the discussion of the company's second position, which was: "That at the time of the seizure the eggs had passed into the general mass of property in the State, and out of the field covered by interstate commerce." [153] The containers had been stored at the company's bakery among other supplies, but the original packages had not been broken. It was held that Congress might pursue the packages into the bakery and might seize them there. The offending articles had not escaped, although they had reached their destination, and had already become part of a larger collection of supplies. The act had forbidden the transportation of adulterated food, and not only had made

the shipper subject to penalties, but had made even the goods themselves so far culpable as to be liable to seizure in rem:

It is clearly the purpose of the statute that they shall not be stealthily put into interstate commerce, and be stealthily taken out again upon arriving at their destination, and be given asylum in the mass of property of the State. Certainly not, when they are yet in the condition in which they were transported to the State, or, to use the words of the statute, while they remain "in the original, unbroken packages." In that condition they carry their own identification as contraband of law. Whether they might be pursued beyond the original package, we are not called upon to say. That far the statute pursues them, and, we think, legally pursues them, and to demonstrate this but little discussion is necessary.

And one characteristic of adulterated food is thus insisted upon, with the legal consequences that flow therefrom:

We are dealing, it must be remembered, with illicit articles—articles which the law seeks to keep out of commerce, because they are debased by adulteration, and which law punishes them (if we may so express ourselves) and the shipper of them. There is no denial that such is the purpose of the law, and the only limitation of the power to execute such purpose which is urged is that the articles must be apprehended in transit or before they have become a part of the general mass of property of the State. In other words, the contention attempts to apply to articles of illegitimate commerce the rule which marks the line between the exercise of Federal power and State power over articles of legitimate commerce. The contention misses the question in the case. There is here no conflict of national and State jurisdictions over property legally articles of trade. The question here is whether articles which are outlaws of commerce may be seized wherever found, and it certainly will not be contended that they are outside of the jurisdiction of the National Government when they are within the borders of a State. The question in the case therefore is: What power has Congress over such articles? Can they escape the consequences of their illegal transportation by being mingled at the place of destination with other property? To give them such immunity would defeat, in many cases, the provision for their confiscation, and their confiscation or destruction is the especial concern of the law. The power to do so is certainly appropriate to the right to bar them from interstate commerce, and completes its purpose, which is not to prevent merely the physical movement of adulterated articles, but the use of them, or rather to prevent trade in them between the States by denying to them the facilities of interstate commerce. And appropriate means to that end, which we have seen is legitimate, are the seizure and condemnation of the articles at their point of destination in the original, unbroken packages.

We have examined this case at such length, because it seems to us that, if our understanding of the court's reasoning be correct, the decision of the present controversy is inevitably foreshadowed. It is true that this is a prosecution under section 2, and not a seizure under section 10; but the difference (if important) is in favor of section 2, for its meaning is not restricted by the words "for sale," and is therefore even broader than the language of section 10. One of the chief objects of the act is declared in section 2, namely, to forbid "*the intro[154]duction into any State or Territory, etc., of any article of food * * * which is adulterated*"; and, while the section does not attempt to punish criminally every method of "introduction," it does punish the method here in question—"any person who shall *ship or deliver for shipment* from any State or Territory," etc., "shall be guilty of a misdemeanor," etc., and the breadth of the prohibition justifies us at least in refusing to narrow the ordinary meaning of the words that define the crime. Of course the shipment must be in the way of "commerce." Such a limitation is constitutionally necessary; but, if the limitation be assumed, no

reason is perceived why "shipment" should be construed to mean "shipment for sale." Its ordinary meaning in this connection covers any shipment for any purpose in the course of commerce, and we accept this as the intended scope of the word. And the correctness of such construction seems more probable when we observe that the next penal clause of section 2 should apparently be construed in a similar manner. This clause applies to any person "who shall receive in any State or Territory," etc., "and, having so received, shall deliver in original unbroken packages * * * or (shall) offer to deliver, to any person any such article so adulterated"—the delivery being punished, whether it be "for pay or otherwise." In other words, to receive and deliver offending articles in the course of commerce is indictable, whatever the business purpose may be.

The Court of Appeals of the Second Circuit, in *United States v. 300 Cans, 189 Fed. 352, 111 C. C. A. 83*, has also ruled that, since the *Hipelite* decision at all events, a libel for condemnation need no longer aver that the articles were transported for sale—the food there in question having been shipped from Nebraska by the owner to himself in New York, and remaining unsold in original unbroken packages.

The facts of the present dispute are these: The defendant has two places of business, one in New Jersey and one in Pennsylvania. The adulterated tomato paste in question was at the New Jersey house, and was shipped to Philadelphia in order to be examined and tested in that city. The test was necessary, because a customer in London had sent an order, and the paste, unless it could meet the English standard, would not fill the customer's requirements. It was not to be sold or used for food in Philadelphia, and it was not so sold or used; but, having failed to meet the English test, it was immediately destroyed, without attempt to use or sell. The test was not made in New Jersey, because facilities for making it there were lacking. The sale would have been completed in Philadelphia, and the shipment for export would have been made from that city, if the paste had met the English test; and in that event the paste (although it might have been adulterated according to the United States standard) would not have been subject to seizure by this Government, if it had been "prepared or packed according to the specifications or directions of the foreign purchaser," etc. (See proviso to section 2.) That an ultimate sale was a possibility, when the shipment was made in New Jersey, is not a decisive consideration; for the sale was never made, and, of course, the goods were never prepared or packed for export. But the English order does have this bearing; it explains why the interstate move[155]ment took place, and shows that the reason was a trade or business reason, and therefore that the movement was in the course of commerce.

In our opinion it was interstate commerce for the owner to ship the goods from New Jersey to Pennsylvania for a business purpose such as examination and test; and as the goods were adulterated such a shipment was unlawful.

The judgment is affirmed.

UNITED STATES v. GERMAN AMERICAN SPECIALTY CO.

(District Court, S. D. New York, February 14, 1913.)

N. J. No. 2465.

An unlabeled article sold as "Egg for Custard" held adulterated because skimmed milk had been substituted in part for the article.

Information charged violation of section 2 of the Food and Drugs Act. Jury trial. Verdict of guilty.

MARTIN, *District Judge* (charge to the jury). [1] This indictment rests upon a provision of what is called the Pure Food Act, which was passed and approved by the Federal Government on June 30, 1906, and which prohibits a substituting of any article wholly or in part for the article as designated in its trade-marking. That is the meaning of the statute upon which this indictment rests.

The indictment says that this defendant company manufactured a certain article of food which article of food bore no label, and was shipped and sold as being an article of food known as egg for custard, which said article shipped as aforesaid was adulterated, [2] in that a certain substance other than egg for custard, to wit, skim milk had been substituted. So in order to convict this defendant, it must come under clause second—if any substance has been substituted wholly or in part for the article, as being a misdemeanor under the statute.

There is a clause before that, as to reducing the strength of any article by having something else in it, but that does not apply to this indictment.

So the question for you to say is whether the defendant has willingly and wilfully substituted an article under the wrong designation, and brought itself within this statute. That is a question of fact for you to dispose of.

As to the degree of culpability, that is for the court, if you find it guilty at all.

This defendant is entitled to the same rights that you and I should have, if we were charged with a crime, and that is, that we are not to be convicted unless the evidence establishes beyond a reasonable doubt the charge alleged against us.

Take the case.

UNITED STATES v. SCUDDER SYRUP CO.

(District Court, N. D. Illinois, February 18, 1913.)

N. J. No. 2473.

Syrup held misbranded because it was short measure.

Information alleging violation of section 2 of the Food and Drugs Act. The product was labeled: (On case) "Two Doz. Purity Quarts Scudder's Canada Syrup, Imported only by Scudder Maple Syrup Company, Chicago, Illinois, Full Measure." Misbranding of the product was alleged in the information for the reason that it was labeled as set forth above, which said statement on the label

attached to the case containing said product was false and misleading in that it purported to state the contents of each of the cans in terms of measure, to wit, that each of the cans contained one quart of Scudder's Canada syrup, whereas, in truth and in fact, each did not contain one quart of the product, but a much less amount, to wit, 93.8 per cent of a quart.

Jury trial. Verdict of guilty.

A. B. ANDERSON, *District Judge* (charge to the jury). [2] This is a criminal case, and you are the judges of the weight of the evidence and the credibility of the witnesses. You are the exclusive judges of all the facts. You are bound by the law as given to you by the court.

The Government has charged that the defendant shipped in interstate commerce a box or case labeled: "Two Doz. Purity Quarts Scudder's Canada Syrup, Imported only by Scudder Maple Syrup Company, Chicago, Illinois, Full Measure."

Now the Government has established that that case was shipped in interstate commerce—as it was, and that the case was labeled as set forth in the information. You are not bound by any expression of opinion, and you are the exclusive judges of the facts and the evidence, to-wit: of the testimony and credibility of witnesses. Now the Government, subject to that, has shown here that the defendant did ship a case labeled as I have stated. The Government also has shown, and there is no dispute about it, that three of these cans did not contain a full quart. In this case the defendant is presumed to be innocent—and that presumption stays with the defendant throughout the trial—and it is a perfect defense, until the Government overcomes it beyond all reasonable doubt. Reasonable doubt is just what the word "reasonable" means, which is as the term implies, a *reasonable* doubt. It is not a captious or capricious doubt. It is not a doubt suggested by the ingenuity of counsel or by your own ingenuity, but it is as the term implies, a reasonable doubt, which is engendered by the evidence or the want of evidence. You, as reasonable men, understand what that means. You are the judges, as I said of the weight of the evidence and the credibility of the witnesses. In determining what weight you shall give to any testimony of any witness, you have a right to take his knowledge, or want [3] of knowledge, into consideration, about the thing about which he testifies—his appearance and manner and bearing on the stand, and particularly his interest, or want of interest, in the result of the suit. These are the general principles by which you are to determine questions of this kind.

Now, gentlemen, the question for you to determine, is this—whether or not this label was false, and of course that must mean it was specifically false. If the case or box contained 24 cans, each of which contained specifically a quart, then of course the defendant is not guilty. The evidence here shows cans will hold a quart.

Now, gentlemen of the jury, the evidence of the defendant here is that this has to be put in here heated, and that it necessarily shrinks some. I instruct you that this is no defense. If they represent on the case—as they did in this case, that 2 dozen purity quarts are contained therein, it means quarts of a gallon—they represent by that label that there was in each of these cans a full quart, and that means at the time, of course, that it was shipped, and if it has to be put in

hot, and after that shrinks, then the defendant ought to put in enough so there would still be a quart.

Now that this matter is before you, you will determine whether or not there has been a violation of this statute. You are simply to determine this one question—whether or not these defendants did ship these in interstate commerce when it was misbranded. Now the fact that the Government is on one side and a citizen on the other, has nothing to do with this case. The Government, when it comes to a lawsuit, is just exactly in the same position as any other litigant. If you have any reasonable doubt as to whether or not there has been a specific violation here, it is your duty to find the defendant not guilty.

If you find for the Government, the form of your verdict will be:

We, the jury, find the defendant guilty, signed by your foreman.

If you find for the defendant, the form of your verdict will be:

We, the jury, find the defendant not guilty, also signed by your foreman, and return to the court.

UNITED STATES v. D. B. SCULLY SYRUP CO.

(District Court, N. D. Illinois, February 18, 1913.)

N. J. No. 2471.

Guaranty given by manufacturer to shipper of a misbranded food held insufficient, and not a guaranty within the meaning of the act.¹

An Information against Daniel B. Scully and Maurice H. Scully, copartners, doing business as the D. B. Scully Syrup Co., Chicago, Ill., alleging the sale by said defendants on April 1, 1910, under a written guaranty given before the time of said sale and delivery, of a quantity of a product known as Loverin's Sorghum, which was alleged to have been misbranded in violation of the Food and Drugs Act. The guaranty aforesaid was in words and figures as follows, to wit:

Food Guaranty.

The undersigned D. B. Scully Syrup Company of Chicago, State of Illinois, United States of America, does hereby warrant and guarantee unto Loverin & Browne Co., a corporation, having office at Chicago, Illinois, that any and all articles of food or drugs, as defined by the Act of Congress approved June 30, 1906, entitled "An Act for preventing the manufacture, sale or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines and liquors, and for regulating traffic therein, and for other purposes," which the undersigned has sold since October 1st, 1906, or shall at any time hereafter prepare, manufacture for, sell or deliver to said Loverin & Browne Co., will comply with all the provisions of said act of Congress and are not and shall not be in any manner adulterated or misbranded within the meaning of said Act.

It is expressly understood that this shall be a continuing guaranty until notice of revocation be given in writing and notice of acceptance of the guaranty is hereby waived.

Dated at Chicago this 31st day of December, 1906.

D. B. SCULLY SYRUP Co. Seal
M. H. SCULLY Seal

The information alleged that said guaranty had not been revoked at the time of said sale and delivery, but was then in full force and effect.

On April 2, 1910, and July 19, 1910, without having changed the product in any particular, save repacking, the purchaser thereof

¹ But see *United States v. Glaser, Kohn & Co.*, N. J. 3400.

shipped quantities of the same from the State of Illinois into the Territory of New Mexico in violation of the Food and Drugs Act. The product was labeled: "1 Gal. Loverin's Sorghum Loverin & Browne Co., Chicago, Ill."

Misbranding of the product was alleged in the information for the reason that it was labeled as set forth above, and the statement in the label was false and misleading, in that it purported to state the contents of each of the cans in terms of measure, to wit, that each of the cans contained one gallon of Loverin's sorghum, whereas, in truth and in fact, each of the cans did not contain one gallon of the product, but a much less amount, to wit, 0.845 of a gallon thereof.

Jury trial. Verdict of not guilty by direction of the court.

A. B. ANDERSON, *District Judge* (directing verdict). I might explain to you gentlemen here that this is an act of Congress, and Congress has no right to legislate on this pure food question except so far as it affects interstate commerce. We all understand that. And, now, there isn't any showing here at all, passing by some other questions, that the Scully Syrup Company, defendant, had anything whatever to do with the shipment. The evidence showed that the Scully Syrup Company made this for Loverin & Browne Company and that Loverin & Browne Company shipped it, so that they have got the wrong defendant here. The Government undertakes to claim that by reason of the statute which provides that the dealer shall be immune when the manufacturer guarantees to him that the article is not misbranded—that in that case the dealer is out, Loverin & Browne Company, and that the other people are in. That does not relieve the Government of the responsibility of proving some connection with the shipment by the Scully Syrup Company. And in the next place, the guarantee set forth is no guarantee at all. The guarantee is no guarantee at all under the statute. It isn't anything in the world but a promise that in the future—made six years ago—they will not violate the law. Let the record show a verdict of not guilty.

UNITED STATES v. HUDSON MANUFACTURING CO.

(District Court, N. D. Illinois, February 21, 1913.)

N. J. No. 2468.

Imitation Vanilla Extract labeled "Prime Vanilla Extract, made from the extractive matter of Prime Vanilla Beans * * *," held adulterated and misbranded.

Information alleging violation of section 2 of the Food and Drugs Act. The article was shown by analysis to contain vanillin, 0.52 per cent; coumarin, slight trace, if any; resins, trace; color caramel. Adulteration of the product was alleged in the information for the reason that an imitation of vanilla extract containing vanillin and artificial coloring matter in solution had been mixed with the product so as to reduce, lower, and injuriously affect its quality and strength, and further for the reason that an imitation of vanilla extract con-

taining vanillin and artificial coloring matter in solution had been substituted in part for the product, and further for the reason that the product was artificially colored in a manner whereby inferiority was concealed, in that the artificial coloring matter aforesaid gave to the imitation vanilla extract the color of genuine vanilla extract. Misbranding was alleged for the reason that the product was an imitation of another article of food, to wit, pure vanilla extract, in that said product contained vanillin and alcohol artificially colored, and for the further reason that said product was offered for sale under the distinctive name of another article of food, to wit, pure vanilla extract. Misbranding was alleged for the further reason that the product was labeled as set forth above, which said statement in the label was false and misleading, in that it represented to the purchaser that the product was a genuine vanilla extract conforming to the commercial standard for such an article of food, to wit, a flavoring extract prepared from vanilla bean with or without sugar or glycerin and containing in 100 cc the soluble matters from not less than 10 grams of the vanilla bean, whereas, in truth and in fact, it contained not to exceed 2 grams of the vanilla bean in 100 cc thereof.

Jury trial. Verdict of guilty.

A. B. ANDERSON, *District Judge* (charge to the jury). [2] This is a criminal case, and you are the judges of the weight of the evidence and the credibility of the witnesses. You are the exclusive judges of all the facts. You are bound by the law as given to you by the court.

The defendant is presumed to be innocent until it is proved guilty by the Government's evidence beyond all reasonable doubt. Reasonable doubt, as I said yesterday, is just what the word "reasonable" means, which is as the term implies, a *reasonable* doubt. It is not a captious or capricious doubt. It is not a doubt suggested by the ingenuity of counsel or by your own ingenuity, but it is as the term implies, a reasonable doubt, which is engendered by the evidence or the want of evidence. You, as reasonable men, understand what that means. You are the judges, as I said, of the weight of the evidence and the credibility of the witnesses. In determining what weight you shall give to any testimony of any witness, you have a right to take his knowledge, or want of knowledge, into consideration, about the thing about which he testifies—his appearance and manner and bearing on the stand, and particularly his interest, or want of interest, in the result of the suit. These are the general principles by which you are to determine questions of this kind.

Now, gentlemen, there is just one question for you to determine—one question of fact, and that is, whether or not the Government has established, according to the standards that the evidence has disclosed to you, that there was added vanillin to this product which was branded as the testimony shows. Now, that this barrel, or half-barrel, of stuff that was sent to Texas contained more vanillin than is ordinarily contained in a pure extract of vanilla, there is no dispute; the witnesses on both sides agree as to that. The question is whether or not it was added in the form of vanillin—what is called the synthetic product or artificial product—as is claimed by the Government, or whether or not this increased vanillin was due to the use of two and a half times, practically, of the amount of vanilla beans

which is ordinarily used in the production of the extract of vanilla. That is the question for you to decide. Now it may be that this vanillin was there by reason of either one of these two theories. Either the manufacturer, the defendant here, manufactured this from the ordinary amount of vanilla beans, or less; that is to say, one pound, or thirteen ounces I believe it is, to about a gallon of the dissolved fluid which is partly alcohol and partly water, and the added amount of vanillin that was in this product was put in there, as it is averred in the information, by the defendant—and in which case the article was adulterated within the law and misbranded within the law—or it was manufactured as claimed by the defendant, that is to say, it was made by using two and a half times as much vanilla beans as is ordinarily used, or is necessary to be used, or it is proper to be used, under the standards which have been testified to here.

[3] Now gentlemen of the jury, you are practical men, and when you go into the jury box you do not lose or set aside your practical knowledge of affairs, nor you are not to lose sight of the motives which ordinarily influence men in their acts, and when you come to decide which way this thing was it is for you to determine which way it happened. You will take into consideration the fact, as shown by the evidence, that this was a commercial article. It was manufactured for the market and sold in the market. And, of course, you know that one of the principal facts or circumstances surrounding the manufacture of an article is the cost of it. If, as appears in evidence, this is manufactured as claimed by the defendant, it cost two and a half times as much to make it as if it were made according to the standards which have been testified to here. On the other hand, if it was made as claimed by the Government, it was made much cheaper than the standards testified to here. You will take those things into consideration.

It has been said here that the witnesses for the Government, the expert chemists, admitted that they did not know and could not tell whether or not it is artificial vanillin added. How can you tell if they can't tell? That is the very thing you are here for. These witnesses spoke as chemists. They stated it as chemists. They could only state it was there; that they found it; that they could not say from the fact it was there how it got there. But you are to take the facts that are there, coupled with the explanation on both sides as to how it might have got there, and determine yourself what the actual fact is.

If you find that this extract was made by adding what is called here artificial vanillin, then your verdict should be guilty; We, the jury, find the defendant guilty as charged. If you find the facts to be that this was made by using two and a half times the amount of vanilla beans ordinarily used in making this standard vanilla extract, notwithstanding the fact that it cost two and a half times as much—if you find that is the way it was done, then your verdict should be, We, the jury, find the defendant not guilty. In either event your verdict should be signed by the foreman and returned into court.

UNITED STATES v. SWEET VALLEY WINE CO.

(District Court, N. D. Ohio, W. D. February 26, 1913.)

208 Fed. 85; N. J. No. 3271.

The Food and Drugs Act is not unconstitutional or void for want of definiteness in fixing legal standards for various wines.

The Sweet Valley Wine Co. was indicted for shipping in interstate commerce certain wines which were alleged to be misbranded in violation of the Food and Drugs Act. On demurrer to indictment. Overruled.

KILLITS, *District Judge* (overruling demurrer). The defendant is indicted on four counts for misbranding under the act of June 30, 1906 (c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1911, p. 1354]), commonly called pure food act. [86]

Under the first count the defendant is charged with shipping an article of food branded as follows: "Select Riesling Wine, Special Vintage, Serial 124." It is charged that under section 8 of said act this article was misbranded so as to deceive and mislead the purchaser, in that it purported to be Riesling wine of select quality, whereas in fact it was a compound of wine and a fermented solution of commercial dextrose, otherwise known as starch sugar.

Under the second and third counts it was charged: That defendant's shipments purported to be Rhine wines of the character known as Hochheimer and Diedesheimer, respectively, whereas the article in each instance was merely an Ohio manufactured product, and a mixture of wine and a fermented solution of commercial dextrose. The character of alleged misbranding in the second count is typical of both the second and third counts. On the neck of the bottle was a label containing these words "Hochheimer Typo, Ohio Serial No. 124, Guaranteed," etc. On the box containing the bottles were the words: "Hochheimer Typo Wine." That the bottle itself was in the design and form of the bottles containing genuine Hochheimer wine, and contained as part of the label a picture representing a German village.

As to the fourth count, the charge is simply that the defendant shipped wine bottled with a label designating the same as "Typo-Niersteiner Wine, Ohio Serial No. 124, Guaranteed," etc., whereas in fact the article therein contained was a mixture of wine or of grape juice and a fermented solution of fermented dextrose, otherwise known as starch sugar.

To these counts a demurrer has been interposed, on the grounds of: (1) The alleged unconstitutionality of the act; (2) that section 8 thereof, under which this prosecution is attempted, is void for want of definiteness in fixing legal standards for the various wines enumerated in said counts; (3) for a failure of the indictment to aver that wines alleged to have been shipped are not normally composed of a mixture of wine and commercial dextrose, and for failure to allege in either of said counts what ingredients or constituents go to compose the normal wines of the various kinds mentioned in said counts; (4) for a failure to allege that other explanatory statements did not appear on the labels which might inform the purchaser of the exact

nature of said wines; (5) for a failure to allege that the various wines therein mentioned and shipped by defendant were foods within the meaning of the act of Congress; (6) that the alleged picture of a German village should be more particularly described, and that the allegation that the picture is a representation of a German village is a mere conclusion; (7) for failure to allege that wines designated as Hochheimer Typo Wines and Diedesheimer Typo Wine, respectively, are not identical with Hochheimer wines and Diedesheimer wines, respectively.

The constitutionality of this act is so generally conceded and so well established that the demurrer on that ground has not been seriously pressed to our consideration, and will not be further entertained.

[87] Section 6 of the act says:

The term "food," as used herein, shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound.

Applying that language and the principle that, unless compelled otherwise, we must take words in an indictment at their ordinary and usual meaning, we find no merit in the contention that this indictment should aver that the wine in question was a food within the purview of the act.

Nor will we spend much time in considering the other grounds of demurrer, save that which insists that section 8 of the act is void for not establishing a standard for the various wines enumerated in the counts of this indictment. The other grounds are not urged upon our consideration in argument, and doubtless have been abandoned; at any rate they do not appeal to us as having much force.

Respecting the second ground of the demurrer, the argument as stated in the brief of counsel is as follows:

Our second ground of demurrer goes to all the five counts of the indictment, and it is that the said act of Congress is void as applied to this particular case because it fails to fix standards for the various wines enumerated in said counts. We do not contend by this ground of demurrer that the said act of Congress is unconstitutional as applied to other cases, but what we maintain is that it is void for uncertainty and indefiniteness as applied to this case.

And to that point are cited a number of cases in which the proposition is urged that a penal act is void for uncertainty in which the offense depends, "not on any standard erected by the law which may be known in advance, but on one erected by a jury, and especially so as that standard must be as variable and uncertain as the views of the different juries may suggest, and as to which nothing can be known until after the commission of the crime." *Louisville & Nashville Rd. Co. v. Commonwealth*, 99 Ky. 132, 35 S. W. 129, 33 L. R. A. 209, 59 Am. St. Rep. 457. This citation is typical of other authorities depended upon by counsel for defendant. They are cases in which the question of what is a just and reasonable rate or toll of compensation for the transportation of passengers or freight is left open to determination by the various tribunals before which the case comes by the statute which makes an undue charge an offense.

Again we say that the words used both in the statute and in this indictment must be given their ordinary and common meaning in the absence of something to demand a special definition. The word "wine" is, by general acceptance and standard definition, understood to mean the fermented juice of the undried grape. The contention

of the defendant would make it practically impossible for Congress to pass an act to correct the evils at which this statute is aimed, for the reason that it would be necessary, not only to amplify the act with very particular and minute definition of standards, but to be constantly amending it and supplementing it as new devices and compounds were placed upon the market. All that can be done, granting that Congress [88] has the right to strike at the evils in question, is to pass a statute in general terms, using words of ordinary acceptance.

But we are referred to section 5796, General Code of Ohio, for a definition of the word "wine," and it is insisted that under the allegations of this indictment the defendant is within that definition. Perhaps we may grant that defendant is protected against the operation of the pure food act respecting misbranding if it complies with the law of Ohio defining what wine is, and that immunity may possibly favor defendant without reference to Food Inspection Decision 120 of the Department of Agriculture, respecting the labeling of Ohio and Missouri wines, but the trouble is that, accepting the description of the indictment as true, defendant's product is not within the terms of the Ohio code definition, which reads:

The term "wine" means the fermented juice of undried grapes. The addition of pure white or crystallized sugar to perfect the wine, or using ingredients necessary solely to clarify and refine it which are not injurious to health, shall not be adulterations. Such wines shall contain at least seventy-five per cent. of pure grape juice, and shall not contain artificial flavoring. Sec. 5796, General Code of Ohio.

Defendant's article of food alleged to be misbranded is not shown to be the fermented juice of undried grapes to which had been added "pure white or crystallized sugar" to perfect it, but it is described as wine ("the fermented juice of undried grapes") to which has been added "a fermented solution of commercial dextrose, otherwise known as starch sugar." It cannot be claimed seriously that there is no difference between adding to the fermented juice of undried grapes "pure white or crystallized sugar," which seems to mean sugar in its commercially dry state, and making a compound of pure wine and a fermented solution of commercial dextrose, or even a fermented solution of commercial sugar. The latter not only involves an additional element not found in the statute in the form of the water used for the solution, but brings into the compound that fermentation which may be peculiar to the dextrose or sugar solutions.

If we were forced to a construction of the Ohio statute, we see substance in the insistence that it provides only for cane or beet sugar of the accepted saccharine content as the perfecting addition rather than dextrose, which is not only but little over half the saccharine efficiency of sugar, bulk for bulk, but contains, in the commercial form at least, a large proportion of dextrin, which cannot be said to be in any sense an equivalent of sugar or within the scope of any reasonable construction of the Ohio statute. In view of the very prevalent impression, 20 years ago, when the act was passed, that glucose or dextrose was not altogether wholesome, a doubt which is not yet altogether dispelled, it is not likely that the Legislature contemplated its use under the terms "pure white or crystallized sugar."

The demurrer is overruled, and defendant will plead to the indictment March 15th next.

DR. J. L. STEPHENS CO. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit, March 13, 1913.)

Circular No. 72, Office of the Solicitor; N. J. No. 2511.

Held, that the word "package" as used in the Food and Drugs Act means the package which passes into the possession of the consumer; and that a physician's prescription, sent through the channels of interstate commerce by a corporation, is subject to the provisions of the Food and Drugs Act.

Error to the District Court of the United States for the Southern District of Ohio. Affirmed.¹

[1]² Before WARRINGTON and DENISON, Circuit Judges, and COCHRAN, District Judge.

By the COURT: This is a proceeding on writ of error to set aside a judgment rendered and sentence pronounced upon an information. The information contained two counts, and was based on the Pure Food and Drugs Act of June 30, 1906. The plaintiff in error, hereafter called defendant, is an Ohio corporation doing business and having its principal office at Lebanon, Ohio. It there maintains a sanatorium, where persons addicted to the drug and liquor habits are treated; and patients are also treated away from the institution through correspondence. According to an agreed statement of facts, the defendant shipped two boxes of medicine by railway from Lebanon, Ohio, to Washington, D. C.; one shipment was made December 19, 1908, and the other October 22, 1909; each box contained 18 bottles of the medicine, and all the bottles contained alcohol as one of the ingredients, and some contained as another ingredient morphine in varying and diminishing quantities. The bottles were labeled "Maplewood Sanatorium. Ledger M. 45. 3,609. Directions: Take half a [2] tablespoon four times a day and as directed." The president of defendant, who was also its medical director, has charge of the patients at the sanatorium, and also of those who are treated at a distance through correspondence. He is a graduate of Columbia University, New York City, and has had a long and varied experience; indeed, he is a specialist in the treatment of patients addicted to drug and liquor habits. In the agreed statement of facts this appears:

It is a recognized fact by the medical profession generally that in the treatment of diseases, especially the drug habit, it is an important, and in most cases a vital factor, that the patient should not know the composition of the medicines given in such treatment.

This agreed fact is offered as a defense to the charge that the medicine in question was mislabeled and misbranded, because correct labeling and branding would defeat the object of the treatment. The defendant has no proprietary medicines and does not offer or sell any medicines to the general public. In every case where a patient applies for treatment, either at the sanatorium or at the patient's home, a history of the case is obtained from the patient, a diagnosis in each instance is made, and a prescription prepared by the medical director to meet the needs of the particular case.

¹ Affirming *United States v. Dr. J. L. Stephens Co.*, p. 466, *ante*.

² The page numbers in brackets refer to the Notice of Judgment.

The cause was submitted upon the agreed statement of facts al-
luded to, and each party asked for a directed verdict. The case was
fully considered by the trial judge, who directed a verdict in favor
of the Government and sentenced the defendant to a fine of \$50 and
costs of prosecution. Among the questions determined was, whether
it was necessary to allege that the two boxes or packages containing
the bottles of medicine were misbranded, the information having
simply charged that each of the bottles contained in such packages
was misbranded. The court held that the word "package," as used
in the act, "means the package which passes into the possession of
the public, of the real consumer; and that the words, 'original un-
broken package,' relate * * * to the package in the form in
which it is received by the vendee or consignee."

Another question determined was:

* * * whether the Pure Food and Drugs Act deals with articles other than
those which are the subject of bargain and sale. It is urged that the medicine
or prescription is a mere incident of the services rendered, and that it is not
therefore to be treated as an article of commerce.

Upon this question the court held:

As was said in the *Hipolite Egg Company* case, 220 U. S. 45, the object of
the law is to keep adulterated and misbranded articles out of the channels of
interstate commerce, and it is immaterial whether the medicine or prescription
which was furnished by the defendant company was the mere incident of the
employment, or its primary object. It is enough to know that the medicine or
prescription was sent through the channels of interstate commerce, and mis-
branded, within the terms of the act.

Still another question was determined:

Is a reputable, regularly licensed, practicing physician, residing in Ohio, who
prescribes for a person beyond the limits of the State and transmits to such
person through the channels of interstate commerce the medicine prescribed,
subject to the penalties of the law, if the medicine so prescribed and so passing
through the channels of interstate commerce, contains morphine—the bottle,
box, container, or package inclosing the medicine so prescribed and to be taken
by the patient not being so labeled as to show the presence of the drug?

[3] We do not find it necessary to pass upon the last question
stated. The medical director did not in his individual capacity pre-
scribe or furnish the medicine for the persons served in this case.
His acts were performed for the corporation, and in legal contempla-
tion by it (*State v. Laylin*, 73 O. S., 90, 100). We agree with Judge
Sater in his conclusions upon the other two questions, and so must
affirm the judgment.

McDERMOTT ET AL. V. WISCONSIN.¹

(United States Supreme Court, April 7, 1913.)

228 U. S. 115.

Statute of the State of Wisconsin forbidding the sale in that State of syrups
mixed with glucose, except when labeled as prescribed by the statute, *held*
invalid.

In Error to the Supreme Court of the State of Wisconsin. Re-
versed and remanded.

¹Not arising under the Food and Drugs Act, June 30, 1906. *McDermott et al. v.*
State, 143 Wis. 18; 126 N. W. 888, reversed and remanded.

The facts, which involve the constitutionality of the Wisconsin syrup law and the construction of the Federal food and drug law, are stated in the opinion.

[124] Mr. Justice DAY delivered the opinion of the court.

The plaintiffs in error, George McDermott and T. H. Grady, were severally convicted in the Circuit Court of Dane County, in the State of Wisconsin, upon complaints made against them by an assistant dairy and food [125] commissioner of that State for the violation of a statute of Wisconsin relating to the sale of certain articles and for the protection of the public health. The convictions were affirmed by the decision of the Supreme Court of Wisconsin. 143 Wis. 18.

The complaint against McDermott charged that on March 2, 1908, at Oregon, in Dane County, he

did unlawfully have in his possession with intent to sell, and did offer and expose for sale and did sell, a certain article, product, compound and mixture composed of more than seventy-five per cent glucose and less than twenty-five per cent of cane syrup, said cane syrup being then and there mixed with said glucose, and that the can containing said compound and mixture was then and there unlawfully branded and labeled "Karo Corn Syrup" and was then and there further unlawfully branded and labeled "10% Cane Syrup, 90% Corn syrup," contrary to the statute in such case made and provided.

As to Grady, the complaint was similar to that against McDermott except that the label designated the mixture as "Karo Corn Syrup with Cane Flavor" and added "Corn Syrup, 85%." The statute of Wisconsin for the violation of which plaintiffs in error were convicted is found in Laws of Wisconsin for 1907, sec. 4601, at page 646, being chapter 557, and the pertinent parts of it are as follows:

Section 1. * * * No person, * * * by himself * * * or agent * * * shall sell, offer or expose for sale, or have in his possession with intent to sell any syrup, maple syrup, sugar-cane syrup, sugar syrup, refiners' syrup, sorghum syrup or molasses, mixed with glucose, unless the barrel, cask, keg, can, pail or other original container, containing the same be distinctly branded or labeled so as to plainly show the true name of each and all of the ingredients composing such mixture, as follows:

* * * * *
 [126] Third. In case such mixture shall contain glucose in a proportion exceeding 75 per cent. by weight, it shall be labeled and sold as "Glucose flavored with Maple Syrup," "Glucose flavored with Sugar-cane Syrup," * * * "Glucose flavored with Refiners' Syrup" * * * as the case may be. The labels * * * shall bear the name and address of the manufacturer or dealer. * * * In all mixtures in which glucose is used in the proportion of more than 75 per cent. by weight, the name of the syrup or molasses which is mixed with the glucose for flavoring purposes and the words showing that said syrup or molasses is used as a flavoring, as provided in this section, shall be printed on the label of each container of such mixture * * * The mixtures or syrups designated in this section shall have no other designation or brand than herein required that represents or is the name of any article which contains a saccharine substance; * * * nor shall any of the aforesaid glucose, syrups, molasses or mixtures contain any substance injurious to health, nor any other article or substance otherwise prohibited by law in articles of food.

The facts are that the plaintiffs in error were retail merchants in Oregon, Dane County, Wisconsin; that before the filing of the complaints against them each had bought for himself for resale as such merchant from wholesale grocers in Chicago and had received by rail from that city twelve half-gallon tin cans or pails of the articles designated in the complaints, each shipment being made in wooden

boxes containing the cans, and that when the goods were received at their stores the respective plaintiffs in error took the cans from the boxes, placed them on the shelves for sale at retail, and destroyed the boxes in which the goods were shipped to them, as was customary in such cases. From their nature, the articles thus canned and offered to be sold, instead of being labeled as they were, if labeled in accordance with the [127] State law, would have been branded with the words "Glucose flavored with Refiner's Syrup," and, as the statute provides that the mixtures or syrups offered for sale shall have upon them no designation or brand which represents or contains the name of a saccharine substance other than that required by the State law, the labels upon the cans must be removed, if the State authority is recognized.

Plaintiffs in error contend that the cans were labeled in accordance with the Food and Drugs Act passed by Congress, June 30, 1906 (34 Stat. 768, c. 3915), and that that fact is evidenced by the decision of the Secretaries of the Treasury, Agriculture and Commerce and Labor made under the claimed authority of that act, which is as follows:

WASHINGTON, D. C., *February 13, 1908.*

We have each given careful consideration to the labeling, under the pure food law, of the thick, viscous syrup obtained by the incomplete hydrolysis of the starch of corn, and composed essentially of dextrose, maltose and dextrin. In our opinion it is lawful to label this syrup as corn syrup, and if to the corn syrup there is added a small percentage of refiner's syrup, a product of cane, the mixture in our judgment is not misbranded if labeled "corn syrup with cane flavor."

GEORGE B. CORTELYOU, *Secretary of the Treasury.*

JAMES WILSON, *Secretary of Agriculture.*

OSCAR S. STRAUS, *Secretary of Commerce and Labor.*

And it is insisted that the Federal Food and Drugs Act passed under the authority of the Constitution has taken possession of this field of regulation and that the State act is a wrongful interference with the exclusive power of Congress over interstate commerce, in which, it appears, the goods in question were shipped. The case presents, [128] among other questions, the constitutional question whether the State act in permitting the sale of this article only when labeled according to the State law is open to the objection just indicated.

That Congress has ample power in this connection is no longer open to question. That body has the right not only to pass laws which shall regulate legitimate commerce among the States and with foreign nations, but has full power to keep the channels of such commerce free from the transportation of illicit or harmful articles, to make such as are injurious to the public health outlaws of such commerce and to bar them from the facilities and privileges thereof. Congress may itself determine the means appropriate to this purpose, and so long as they do no violence to other provisions of the Constitution it is itself the judge of the means to be employed in exercising the powers conferred upon it in this respect. *McCulloch v. Maryland*, 4 Wheat., 316, 421; *Lottery Case*, 188 U. S. 321, 355; *Hipolite Egg Co. v. United States*, 220 U. S. 45; *Hoke v. United States*, 227 U. S. 308.

The Food and Drugs Act was passed by Congress, under its authority to exclude from interstate commerce impure and adulter-

ated food and drugs and to prevent the facilities of such commerce being used to enable such articles to be transported throughout the country from their place of manufacture to the people who consume and use them, and it is in the light of the purpose and of the power exerted in its passage by Congress that this act must be considered and construed. *Hipolite Egg Co. v. United States*, supra.

Section 2 of the act provides that—

the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia * * * of any article of food or drugs which is adulterated or misbranded, within the meaning of this act, is hereby prohibited; and any person who shall [129] ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia * * * any such article so adulterated or misbranded within the meaning of this act, * * * shall be guilty of a misdemeanor, and for such offense be fined, etc.

The article of food or drugs, the shipment or delivery for shipment in interstate commerce of which is prohibited and punished, is such as is *adulterated or misbranded within the meaning of the act*. What it is to adulterate or misbrand food or drugs within the meaning of the act requires a consideration of its other provisions, wherein such adulteration or misbranding is defined.

According to the terms of section 7 drugs are “adulterated” where, if they are sold under a name recognized in the United States Pharmacopœia and differ from the standard of strength therein laid down, the standard of strength, etc., is not plainly stated upon the bottle, box, or other container; and food is “adulterated” where it contains an added poisonous or other added deleterious ingredient which may render it injurious, except that, where directions are printed on the covering or the package for the necessary removal of such preservative, the provisions of the act shall apply only when the food is ready for consumption. Turning to section 8, we find that the term “misbranded,” as used in the statute, shall apply to all drugs or articles of food, the package or label of which shall bear any statement, design or device regarding such article, or the ingredients or substances contained therein, which is false or misleading in any particular, and to any food or drugs product which is falsely branded as to the State, etc., in which it was manufactured; and in the case of drugs it is provided that, if the contents of the package as originally put up shall have been removed in whole or in part and other contents placed in such package, or, if the package fail to bear a statement on the label as required, the drugs [130] shall be deemed misbranded; and as to food, if it shall be labeled or branded so as to deceive or mislead a purchaser or purport to be a foreign product when not so, or, if the contents of the package as originally put up shall have been removed in whole or in part and other contents placed in such package, or, if the package fail to bear a statement on the label as required, or, if in package form and the contents are stated in terms of weight or measure and they are not plainly and correctly stated on the outside of the package, or, if the package containing it or its label contain any design or device regarding the ingredients or the substances contained therein which are false or misleading in character, the food shall be deemed misbranded. That the word “package” or its equivalent expression, as used by Congress in sections 7 and 8 in defining what shall constitute adulteration and

what shall constitute misbranding within the meaning of the act, clearly refers to the immediate container of the article which is intended for consumption by the public, there can be no question. And it is sufficient, for the decision of these cases, that we consider the extent of the word package as thus used only, and we therefore have no occasion, and do not attempt, to decide what Congress included in the term "original unbroken package" as used in the second and tenth sections and "unbroken package" in the third section. Within the limitations of its right to regulate interstate commerce, Congress manifestly is aiming at the contents of the package as it shall reach the consumer, for whose protection the act was primarily passed, and it is the branding upon the package which contains the article intended for consumption itself which is the subject-matter of regulation. Limiting the requirements of the act as to adulteration and misbranding simply to the outside wrapping or box containing the packages intended to be purchased by the consumer, so that the importer, by [131] removing and destroying such covering, could prevent the operation of the law on the imported article yet unsold, would render the act nugatory and its provisions wholly inadequate to accomplish the purposes for which it was passed.

The object of the statute is to prevent the misuse of the facilities of interstate commerce in conveying to and placing before the consumer misbranded and adulterated articles of medicine or food, and in order that its protection may be afforded to those who are intended to receive its benefits the brands regulated must be upon the packages intended to reach the purchaser. This is the only practical or sensible construction of the act, and, for the reasons we have stated, we think the requirements of the act as so construed clearly within the powers of Congress over the facilities of interstate commerce, and such has been the construction generally placed upon the act by the Federal courts. *In re Wilson*, 168 Fed. 566; *Nave-McCord Mercantile Co. v. United States*, 182 Fed. 46; *United States v. American Druggists' Syndicate*, 186 Fed. 387; *United States v. 10 Barrels of Vinegar*, 186 Fed. 399; *Von Bremen v. United States*, 192 Fed. 904; *United States v. 75 Boxes of Alleged Pepper*, 198 Fed. 934.

While these regulations are within the power of Congress, it by no means follows that the State is not permitted to make regulations, with a view to the protection of its people against fraud or imposition by impure food or drugs. This subject was fully considered by this court in *Savage v. Jones*, 225 U. S. 501, in which the power of the State to make regulations concerning the same subject-matter, reasonable in their terms and not in conflict with the acts of Congress, was recognized and stated, and certain regulations of the State of Indiana were held not to be inconsistent with the Food and Drugs Act of Congress. While this is true, it is equally well settled that the State [132] may not, under the guise of exercising its police power or otherwise, impose burdens upon or discriminate against interstate commerce, nor may it enact legislation in conflict with the statutes of Congress passed for the regulation of the subject, and if it does, to the extent that the State law interferes with or frustrates the operation of the acts of Congress, its provisions must yield to the superior Federal power given to Congress by the Constitution. *Texas*

& Pacific Ry. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426; Northern Pacific Ry. Co. *v.* Washington, 222 U. S. 370; Southern Ry. Co. *v.* Reid, 222 U. S. 424; Second Employers' Liability Cases, 223 U. S. 1; *Savage v. Jones*, *supra*, 533.

Having in view the interpretation we have given the Food and Drugs Acts and applying the doctrine just stated to the instant cases, how does the matter stand? When delivered for shipment and when received through the channels of interstate commerce the cans in question bore brands or labels which were supposed to comply with the requirements of the act of Congress. Whether the Secretaries had the power under the Food and Drugs Act to make the regulation set out above is not now before us. It is enough for the present purpose to say that, so far as this record discloses, it was undertaken in good faith to label the articles in compliance with the act of Congress. and, if they were not so labeled, by section 2 provision is made for the enforcement of the act by criminal prosecution and by section 10 by proceedings *in rem*. Whether the labels complied with the Federal law was not for the State to determine. This was a matter provided for by the act of Congress and to be determined as therein indicated by proper proceedings in the Federal courts.

The label upon the unsold article is in the one case the evidence of the shipper that he has complied with the act of Congress, while in the other, by its misleading and false character, it furnishes the proof upon which the Federal [133] authorities depend to reach and punish the shipper and to condemn the goods. If truly labeled within the meaning of the act his goods are immune from seizure by Federal authority; if the label is false or misleading within the terms of the law the goods may be seized and condemned. In other words the label is the means of vindication or the basis of punishment in determining the character of the interstate shipment dealt with by Congress. While in this situation, the goods being unsold, as a condition of their legitimate sale within the State, and also of their being in the possession of the importer for the purpose of sale and of being exposed and offered for sale by him, the Wisconsin statute provides that they shall bear the label required by the State law and none other (which represents a saccharine substance, as do the labels in these cases). In other words, it is essential to a legal exercise of possession of and traffic in such goods under the State law that labels which presumably meet with the requirements of the Federal law and for the determination of the correctness of which Congress has provided effectual means, shall be removed from the packages before the first sale by the importer. In this connection it might be noted that as a practical matter, at least, the first time the opportunity of inspection by the Federal authorities arises in cases like the present is when the goods, after having been manufactured, put up in package form and boxed in one State and having been transported in interstate commerce, arrive at their destination, are delivered to the consignee, unboxed, and placed by him upon the shelves of his store for sale. Conceding to the State the authority to make regulations consistent with the Federal law for the further protection of its citizens against impure and misbranded food and drugs, we think to permit such regulation as is embodied in this statute is to permit a

State to discredit and burden legitimate Federal regulations of interstate commerce, to destroy rights arising out of the Federal [134] statute which have accrued both to the Government and the shipper. and to impair the effect of a Federal law which has been enacted under the constitutional power of Congress over the subject.

To require the removal or destruction before the goods are sold of the evidence which Congress has by the Food and Drugs Act, as we shall see, provided may be examined to determine the compliance or noncompliance with the regulations of the Federal law, is beyond the power of the State. The Wisconsin act which permits the sale of articles subject to the regulations of interstate commerce only upon condition that they contain the exclusive labels required by the statute is an act in excess of its legitimate power.

It is insisted, however, that, since at the time when the State act undertook to regulate the branding of these goods, namely, when in the possession of the plaintiffs in error and held upon their shelves for sale, the cans had been removed from the boxes in which they were shipped in interstate commerce, they had therefore passed beyond the jurisdiction of Congress, and their regulation was exclusively a matter for State legislation. This assertion is based upon the original package doctrine as it is said to have been laid down in the former decisions of this court. The term "original package" had its origin in *Brown v. Maryland*, 12 Wheat. 419, in which this court had to consider the extent of the protection given under Federal authority to articles imported into this country from abroad for sale, and it was there held that (p. 441):

When the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it [135] was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution.

That doctrine has been many times applied in the decisions of this court in defining the line of demarcation which shall separate the Federal from the State authority where the sovereign power of the Nation or State is involved in dealing with property. And where it has been found necessary to decide the boundary of Federal authority it has been generally held that, where goods prepared and packed for shipment in interstate commerce are transported in such commerce and delivered to the consignee and the package by him separated into its component parts, the power of Federal regulation has ceased and that of the State may be asserted. Some of the cases in which this doctrine has been considered will be found in the margin.¹ In the view, however, which we take of this case it is unnecessary to enter upon any extended consideration of the nature and scope of the principles involved in determining what is an original package. For, as we have said, keeping within its constitutional limitations of authority, Congress may determine for itself the character of the means necessary to make its purpose effectual in preventing the ship-

¹ *Leisy v. Hardin*, 135 U. S. 100; *Rhodes v. Iowa*, 170 U. S. 412, 424; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 19 *et seq.*; *May v. New Orleans*, 178 U. S. 496; *Austin v. Tennessee*, 179 U. S. 343; *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 519 *et seq.*; *Cook v. Marshal County*, 196 U. S. 261; *Heyman v. Southern Ry. Co.*, 203 U. S. 270, 276; *Savage v. Jones*, 225 U. S. 501, 520; *Purity Extract Co. v. Lynch*, 226 U. S. 192, 200.

ment in interstate commerce of articles of a harmful character, and to this end may provide the means of inspection, examination and seizure necessary to enforce the prohibitions of the act, and when section 2 has been violated the Federal authority, in enforcing either section 2 or section 10, may follow the adulterated or misbranded article at least to the shelf of the importer.

[136] Congress having made adulterated and misbranded articles contraband of interstate commerce, in the manner we have already pointed out, provides in section 10 of the act that such articles may be proceeded against and seized for confiscation and condemnation while being transported from one State, Territory, District, or insular possession to another for sale, or, having been transported, remaining, "unloaded, unsold, or in original unbroken packages," and the subsequent provisions of the section regulate the disposition of the articles seized. To make the provisions of the act effectual, Congress has provided not only for the seizure of the goods while being actually transported in interstate commerce, but has also provided for such seizure after such transportation and while the goods remain "unloaded, unsold, or in original unbroken packages." The opportunity for inspection en route may be very inadequate. The real opportunity of Government inspection may only arise when, as in the present case, the goods as packed have been removed from the outside box in which they were shipped and remain, as the act provides, "unsold." It is enough, by the terms of the act, if the articles are *unsold*, whether in original packages or not. Bearing in mind the authority of Congress to make efficient regulations to keep impure or misbranded articles out of the channels of interstate commerce, we think the provisions of section 10 are clearly within its power. Indeed it seems evident that they are measures essential to the accomplishment of the purpose of the Act.

The doctrine of original packages had its origin in the opinion of Chief Justice Marshall in *Brown v. Maryland*, already referred to. It was intended to protect the importer in the right to sell the imported goods which was the real object and purpose of importation. To determine the time when an article passes out of interstate into State jurisdiction for the purpose of taxation is entirely [137] different from deciding when an article which has violated a Federal prohibition becomes immuné. The doctrine was not intended to limit the right of Congress, now asserted, to keep the channels of interstate commerce free from the carriage of injurious or fraudulently branded articles and to choose appropriate means to that end. The legislative means provided in the Federal law for its own enforcement may not be thwarted by State legislation having a direct effect to impair the effectual exercise of such means.

For the reasons stated, the statute of Wisconsin, in forbidding all labels other than the one it prescribed, is invalid, and it follows that the judgments of the State court affirming the convictions of the plaintiffs in error for selling the articles in question without the exclusive brand required by the State, must be reversed, and the cases are remanded to the State court for further proceedings not inconsistent with this opinion.

UNITED STATES v. WELLS. (TWO CASES.)

(District Court, W. D. Tennessee, W. D., April 21, 1913.)

N. J. No. 3306.

Informations charging violations of the Food and Drugs Act should be supported by the oath of some one having knowledge of the facts showing the existence of probable cause.

Informations against J. Lindsay Wells charging violations of the Food and Drugs Act, June 30, 1906.

On demurrers to informations. Sustained.

McCALL, *District Judge*. This case is before me upon a demurrer to the information, wherein J. Lindsay Wells is charged with a violation of The Pure Food and Drugs Act. (U. S. Comp. Stat. Supp., 1909, p. 1187.)

There are two grounds of demurrer

First. The said information fails to allege and state that the information therein contained had been sworn to or the facts made upon oath before a United States Commissioner, and, in fact, no affidavit had been made or examination had before a proper officer, previous to the filing of said information, touching the matters and things in said information set out.

Second. Said information is not issued in compliance with Article 4 of the Amendments of the Constitution of the United States.

The record shows that on February 15, 1913, the Honorable Casey Todd, United States District Attorney, filed with the clerk of this court an information, setting out certain acts of J. Lindsay Wells, which are alleged to be a violation of the statutes made and provided in such cases. Upon the filing of said information and on the same day there was issued by the clerk a *capias* out of this court for the arrest of J. Lindsay Wells, commanding that he be brought before this court on the fourth Monday of May, 1913, to answer the charges in said information. Also, on the same day, there was issued a summons for said J. Lindsay Wells to appear and answer said information. Said summons and *capias* were executed as commanded by the United States Marshal and returned and filed in court on February 17, 1913, on which date said Wells appeared before A. G. Mathews, United States Commissioner, and gave bond for his appearance at the May term of the court to further answer said information.

The demurrer raises the question as to the validity of the information and the proceedings thereunder.

There was no affidavit or other paper, tending to support the statement contained in the information, other than the information itself, signed by the United States District Attorney, Hon. Casey Todd.

There is no question that offenses of this character may be prosecuted upon information and without an indictment. The question is, is the proceeding by information in conformity with law?

In the case of *United States v. Morgan*, 222 U. S. 274, the Supreme Court, in passing upon the question as to whether or not it was necessary to give notice to the accused of the purpose of the Government

to indict him for a violation of the Pure Food and Drugs Act, held that such notice was not necessary, and, among other things, said:

A further answer is, that as to this and every other offense the Fourth Amendment furnishes the citizen the nearest practicable safeguard against malicious accusations. He can not be tried on an information unless it is supported by the oath of some one having knowledge of the facts showing the existence of probable cause.

The last sentence in the excerpt may possibly be held to be dictum in that case, but it gives expression to the views of the Supreme Court touching the proper construction of the Fourth Amendment to the Constitution of the United States, in cases prosecuted upon information.

There is nothing in the case at bar that indicates that the information filed by the District Attorney is supported "by the oath of some one having knowledge of the facts showing the existence of probable cause." Indeed, it is conceded by the Government that no such affidavit or statement was made by any one and presented with the information when application was made, either for the summons or *capias* for the defendant.

It is insisted by the Government that the information filed, signed by the District Attorney, is itself made under oath, since the District Attorney is a sworn officer of the Government, and it was not necessary for him to further have verified it.

I do not think this contention is in keeping with the language above quoted from the case of *United States v. Morgan*. For to so hold would be to say that the information is self-supporting and made no support by the oath of some one having knowledge of the facts, showing the existence of probable cause.

This view is also sustained by Judge Ray, in the case of *United States v. Baumart et al.*, 179 Fed. 735.

In addition, it seems to me that the proceeding in this case is irregular and unauthorized by law.

As has been seen, the District Attorney prepared his information, filed it with the clerk of the United States District Court, which official thereupon issued the *capias* and summons for the defendant. The cases to which my attention has been called, impress me with the idea that before a summons or *capias* is issued in cases of this character, wherein the defendant is charged with a crime upon a conviction for which he may be fined and imprisoned, that the information should be presented to the Judge, supported by the oath of some one having knowledge of the facts, showing the existence of probable cause. This evidence may be oral or by affidavits. Upon the hearing of which, the court may or may not cause the arrest of the accused and have him brought before the court to answer the charge, just as he may believe that the evidence does or does not show probable cause. In other words, before a citizen is arrested, there should be facts sworn to and presented to the court, showing the existence of a probable cause for such arrest. See *United States v. Baumart*, *supra*, and authorities there cited.

I think the demurrer in this case should be sustained, and the information quashed and the defendant discharged.

An order will be entered accordingly.

A like order will be entered in No. 192, *United States v. J. Lind-say Wells*.

UNITED STATES v. WRIGHT ET AL.

(District Court, W. D. Missouri, May 5, 1913.)

N. J. No. 2828.

Crude pyroligneous acid labeled "Wright's Condensed Smoke," and "A Liquid Smoke," *held* not misbranded.

Information charging misbranding in violation of the Food and Drugs Act. Jury trial. On demurrer to evidence. Sustained.

On February 10, 1913, the United States Attorney for the Western District of Missouri, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against E. H. Wright, George D. Wright, and T. W. Buckner, partners doing business under the firm name and style of E. H. Wright Co., Ltd., Kansas City, Mo., alleging shipment by said defendants in violation of the Food and Drugs Act, on or about February 2, 1911, from the State of Missouri into the State of Indiana, of a quantity of so-called "Wright's Condensed Smoke," which was alleged to have been misbranded. The product was labeled: "Wright's Condensed Smoke A Liquid Smoke made by distilling wood for smoking all kinds of meats. No. 541. Guaranteed by E. H. Wright Co. under the Food and Drugs Act, June 30, 1906. It will preserve the meat for any length of time, keeping it solid and sweet and free from mold, skippers, flies and all other insects. It imparts a true Hickory Smoke flavor to meats, that can be obtained in no other way, making the meat perfectly wholesome and palatable. One bottle will smoke 250 to 300 pounds of meat. Price 75 cts. per Bottle. Every bottle guaranteed to be perfectly satisfactory or money refunded. Get the genuine Wright's Condensed Smoke Manufactured only by The E. H. Wright Co. Limited, Kansas City, Mo."

Analysis of a sample of the product by the Bureau of Chemistry of this Department showed that the sample had the general appearance, color, odor, and behavior on distillation of crude pyroligneous acid; that it contained methyl alcohol or a volatile methyl ester, calculated as methyl alcohol, approximately two thirds gram per 100 cc. Misbranding of the product was alleged in the information for the reason that the label upon each of the bottles containing the product, wherein it was stated that the product was a liquid smoke made by distilling wood for smoking all kinds of meats, was false and misleading in that the product was not a condensed liquid smoke as stated on the labels, but, in truth and in fact, was crude pyroligneous acid. Misbranding was alleged for the further reason that the labels upon the bottles, wherein it was stated that the product was a liquid smoke made by distilling wood for smoking all kinds of meats, deceived and misled the purchaser into the belief that the product was a liquid smoke made by distilling the wood for smoking all kinds of meats, whereas, in truth and in fact, it was not a liquid smoke but a crude pyroligneous acid.

On May 5, 1913, the case having come on for trial before the court and a jury, the defendants entered pleas of not guilty, and at the close of the Government's case, after argument of a demurrer inter-

posed by defendants, the said demurrer to the evidence was sustained, as will more fully appear from the following opinion by the court:

VAN VALKENBURG, *District Judge*. I have been following this very closely, and I have read all of the citations suggested that I was not already familiar with. Now, I think this label itself, within the spirit and purview of this act, reads the Government out of court, and that, combined with what has been added in the way of testimony, but emphasizes that conclusion.

In the first place, it is clearly established from the Government's standpoint that there is no such thing as a condensed smoke, or liquid smoke; there is nothing but smoke, which can not be reduced to any such form as is stated here. Secondly, the defendant in this case has not been putting off his article as and for some other recognized article of commerce. If he has been representing that he has a thing here that will do what some other thing will do, that is an entirely different consideration; whether it will or not, we do not know, at least we do not know in this case, and that is immaterial to this particular form of charge. It is not charged that there is being perpetrated a cheat or fraud in the sense that he is putting off a worthless article or deleterious article, but simply that he is putting off on the public an article which is represented to be a specific article of commerce, which it is not. Smoke is not an article of commerce in the sense we are speaking of here, a commodity that can be bottled and confined and sent off as you can do with this product; but, anyway, "Wright's Condensed Smoke, Liquid Smoke," now what is it? Why, it is made by distilling wood for smoking all kinds of meats, and that is exactly what this stuff is, according to the evidence. Of course, you say this is not smoke, because smoke is not made by distillation; it is made by imperfect combustion; but this, on the face of it, is not something that would mislead the public into believing that it was identical with smoke. There is no one in the world, whether he be a technical man or a layman, who would be deceived into thinking this is smoke that goes up the chimney; everybody knows it is not that. They are addressing themselves to a specific commercial object, and that is the curing of meat, and they represent here that this is a liquid which is made from distilling wood, which, as you might say, is a fanciful or descriptive name referring to the object.

They use the term in a way no one can misunderstand. They use the technical term of "smoking" meat, and they tell you how to pour it over the meat, and by that means cure it, in a way that does not deceive anybody; they know it is a liquid. Now, whether its effects are deleterious we do not know, and that has nothing to do with the question. Everybody who buys it knows that it is a liquid he is getting, and that there is no such thing as smoke in a liquid or condensed form which can be put up in bottles or cartons and carried around. The label goes on to say that it will preserve meat and impart a true hickory smoke flavor to the meat, and everything you get from this label merely goes to the effect that they have produced a liquid in a specified way, which is true.

The Government, in trying to show that this is not smoke produced by combustion, has shown that it is produced in exactly the same kind of way that is stated on that label. The fact is that they

have produced something here which they say has something of the flavor and properties similar to the curative properties of smoke; they get it out of wood, and they get it by distillation, and it turns out to be a substance like, if not exactly identical with, pyroligneous acid. Well, nobody could be deceived into thinking it was specifically what the indictment charges they are being deceived with. It is a thing which is produced in such a manner from the art and methods employed in it, that the application of the term "smoke" to it seems to me to be apt or applicable instead of deceptive, and it does not deceive in the sense this statute implies.

No one can be more in sympathy and harmony with the Food and Drugs Act than I am, and for that reason I deprecate any effort to place a strained or unreasonable construction upon its terms, which can not help but bring it into disrepute and disrespect with the public. I am not saying this in criticism of the Department or of the district attorney. No doubt there is a point of view that perhaps can be taken in the sense in which this prosecution is leveled, but in its practical application, which is the application the courts in their last analysis must place upon it, it is not a prosecution which aims at the particular thing that this law, at least as construed, was aimed to affect in the sale of drugs and food.

The Supreme Court in the Johnson Remedy case says that the law can not be extended to include mere misrepresentations, or rather a mere question of whether the label properly indicates the effectiveness of the article. And in the Bleached Flour case, the court said that it could not be extended to include adulterations only to such an extent that there was enough to be clearly provable as deleterious to health. Those two features have been eliminated from this act, and if they are to be restored, or either of them, it rests with Congress, and the courts can not get around those points and extend the operative effect of this act by interpretations of the branding. If that is the intention of the Department, it must fail so far as this court is concerned. The term "misbranding" will not take the place of adulteration in some respects or of utility or effectiveness in others. It is for Congress to remedy the law if it is defective.

And, furthermore, in cases which are supposed to be cases of misbranding because of producing deception, it must be of such a substantial nature that the court, if it permitted it to go to the jury, and the jury should find a verdict sustaining the charge, could permit such verdict to stand. In this case I do not feel that I could do so, and the demurrer to the evidence is sustained.

UNITED STATES v. GOODMAN.

(District Court, E. D. New York, May 9, 1913.)

N. J. 2844.

An article labeled "Cordial Non-Alcoholic Rock & Rey" *held* not adulterated or misbranded.

Information alleging adulteration and misbranding in violation of the Food and Drugs Act. On demurrer to information. Sustained.

On February 5, 1913, the United States Attorney for the Eastern District of New York, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against Henry D. Goodman, doing business and trading under the name and style of Fulton Extract & Cordial Works, Brooklyn, N. Y., alleging shipment by said defendant, in violation of the Food and Drugs Act, on December 7, 1911, from the State of New York into the State of New Jersey, of a quantity of so-called Cordial Non-Alcoholic Rock and Rey, which was alleged to have been adulterated and misbranded. The product was labeled: (On barrel head) "Cordial Non-Alcoholic Rock & Rey (W8611 12-8-11)" (Tag): "Mr. A. Kandel 557-559 Market St., Newark, N. J. From Fulton Extract & Cordial Works 817 Myrtle Ave., Brooklyn, N. Y."

Analysis of a sample of the product by the Bureau of Chemistry of this Department showed that it was a preparation of water, sugar, glucose, and artificial coloring matters, sold in imitation of rock and rye cordial. Adulteration of the product was alleged in the information for the reason that it contained a substance and substances which had been substituted in part for the article, to wit, a syrup containing sugar, commercial glucose, and artificial coloring matter. Misbranding was alleged for the reason that the statement "Cordial Non-Alcoholic Rock & Rey," borne on the label, was false and misleading in that said label purported that the product was composed of rock and rye, which is a mixture of rock candy and rye whisky, whereas, in truth and in fact, it was not a mixture of rock candy and rye whisky, but was a syrup containing sugar, commercial glucose, and artificial coloring matter, and said label did not set forth all the ingredients and substances in said product and failed to set forth that the product did contain another substance and substances, to wit, sugar, commercial glucose, and artificial coloring matter. Misbranding was alleged for the further reason that the statement "Cordial Non-Alcoholic Rock & Rey," borne on the label, was false and misleading in that it represented that the product was a cordial, whereas, in truth and in fact, it was not a cordial, but was a syrup containing sugar, commercial glucose, and artificial coloring matter. Misbranding was alleged for the further reason that the statement borne on the label thereof, to wit, "Cordial Non-Alcoholic Rock & Rey," deceived and misled the purchaser into the belief that the product was cordial, containing rock and rye, a mixture of rock candy and rye whisky, whereas, in truth and in fact, it was not a cordial containing rock and rye or a mixture of rock candy and rye whisky, but consisted of a syrup containing sugar, commercial glucose, and artificial coloring matter.

On February 20, 1913, the defendant filed his demurrer to the information and on May 9, 1913, the court sustained the demurrer, as will more fully appear from the following memorandum decision by the court:

VEEDER, *District Judge*. This is a demurrer to an information under the Food and Drugs Act. The article of food in question was labeled by the defendant "Cordial Non-Alcohol Rock & Rey." It is alleged that it was in fact a syrup containing sugar, commercial glucose, and artificial coloring matter. The supporting affidavit shows that it contained, in addition, prune juice.

The information charges the defendant, in one count, with adulteration, and in three other counts with misbranding.

With respect to adulteration the allegation is that the defendant's food product contained substances—that is, sugar, commercial glucose, and artificial coloring matter—"which had been substituted in part for the said article." But the ingredients of the "said article" which is thus alleged to have been debased by an admixture of the substances mentioned are not alleged, and they are certainly not within common knowledge. Adulteration is a relative term, and unless the relation is disclosed no offense is set up.

The second, third, and fourth counts charge misbranding—that the label was false and misleading in representing the article to be (a) a compound of rock candy and rye whisky, (b) a cordial, (c) a cordial containing rock candy and rye whisky, whereas it was syrup containing sugar, commercial glucose, and artificial coloring matter.

The designation "Cordial Non-Alcoholic Rock & Rey" is an arbitrary and fanciful one, calculated at once to put a purchaser upon inquiry as to the ingredients. But the word non-alcoholic clearly indicates that the product does not contain whisky and that it is not a cordial, the essential ingredient of which is alcohol. Since the act does not require that the ingredients of such a product shall be stated, I am of the opinion that the information fails to set up a case of misbranding.

The demurrer is sustained.

UNITED STATES v. WEEKS.

(District Court, S. D. New York, May 13, 1913.)

N. J. No. 2848.

An article labeled "Creamthick * * * Guaranteed to contain no gelatin, gum arabic, egg albumen, or similar article," *held* misbranded in that it contained an article similar to gum arabic, to wit, Indian gum.

Information alleging misbranding in violation of the Food and Drugs Act. Jury trial. Verdict of guilty.¹

On February 4, 1913, the United States Attorney for the Southern District of New York, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against Oscar J. Weeks, doing business under the name of O. J. Weeks & Co., New York, N. Y., alleging shipment by said defendant, in violation of the Food and Drugs Act, on September 28, 1911, from the State of New York into the State of Missouri, of a quantity of a product called "Creamthick," which was misbranded. The product was labeled: "Creamthick—Serial No. 2049—Manufactured by O. J. Weeks & Co., New York, N. Y. It is guaranteed to contain no gelatine, gum arabic, egg albumen, or similar article."

Analysis of a sample of the product by the Bureau of Chemistry of this Department showed it to consist of a mixture containing approximately equal parts of Indian gum and rice flour. Misbranding of the product was alleged in the information for the reason that the statement on the label, "It is guaranteed to contain no gelatine, gum

¹ Affirmed in Circuit Court of Appeals, Second Circuit, p. 836, *post*.

arabic, egg albumen, or similar article," regarding the ingredients and substances contained in the product, was false and misleading, and the label was calculated to mislead and deceive the purchaser thereof, in that the product did contain as one of its ingredients an article similar to gum arabic, to wit, Indian gum.

On May 13, 1913, the case having come on for trial before the court and a jury, after the submission of evidence and argument by counsel, the following charge was delivered to the jury by the court:

HAND, *District Judge*. The charge against this defendant is the violation of the Pure Food & Drugs Act. That act provides that if any part of the label on goods sent in interstate commerce is misleading, the crime has been committed.

The jurisdiction of this court to determine that depends on the fact that the Government has charge of interstate commerce. I do not recall whether any of you gentlemen have had any such case or not, but to such of you as have not it may be necessary to explain just why we are all here. Congress has attempted by this law to keep people from sending from one State to another food about which there are misstatements of fact—in this case, on the can.

The defendant is not charged with having adulterated this substance, so you need not concern yourselves about that. I remember, last night, one of the jurors wanted to know whether there was anything deleterious or injurious in this. The Government concedes that there is not. And I think I told him, and I tell you now, that that has nothing to do with the matter, because we are concerned not only with prevention of those things getting into food which are injurious, but we are also concerned with having people know what they get from the outside of the package. I think that will commend itself to your good sense and judgment, that when we buy something as a food, a man shall not be allowed to mislead us about it, and if he makes any statement about what is inside of the package, and it turns out to be untrue, he cannot come to me and say, "Well, it is true that I did not sell what I said I would sell you, but it did not do you any harm; you are just as well off as though you had what I sold you." You would answer him by saying, "That may all be very true, but it is not relevant; I am entitled to know what I am getting, and I am entitled to rely on what you tell me I am getting, and if you have not given me what you told me I was getting, I have a grievance against you." And it is that grievance which Congress has sought to prevent—within the limits of the power of Congress, which means interstate commerce, and it is on that charge that this defendant is before the court. So it is of no consequence in the case whether you find rice flour is innocuous, or the gum chadya which you eat.

Now, there is a very limited statement here which is the only thing that this case turns on. This defendant has invented a name of his own for this substance, and he is entitled to use it—an artificial name—no one challenges it. And you see that there is a good deal of printed matter on the outside of the can here. You can take it and read it if you like, but it will not help you in deciding the case, excepting in so far as it may color and throw light upon the particular phrase, which is the phrase which the Government challenges in this case. I am going to speak of that in a moment. But it is perfectly proper for you to take this and read the whole of it if you like,

in an effort to understand what the words which the Government has singled out really mean.

Now, gentlemen, you have in this case to deal with something that we in court have very constantly to deal with, and that is the meaning of language. I suppose all of you, although none of you are learned in law, know how ambiguous language is. A great diplomatist once said that words were designed to conceal ideas. And sometimes it almost seems as though they were. At least, they can be made to conceal ideas. But that is not the purpose, and that is not what they do between man and man. They are meant to convey ideas, and the only way that you can get the meaning of words is not by taking them and reading them from a dictionary. Lawyers very often come to me when I construe a statute, and bring to me a dictionary to use, and I find that it does not help me a bit. I do not care so much what the dictionary says. What I try to do when I am finding out what words mean, and particularly written words, is to exercise a certain process of imagination in the matter. I try to put myself in the position of the man that used the words. What did he think those words would mean to the people to whom he used them? When I try to do that, the next thing I have to do is to say, Who did he think would read those words? What other words did he think these men would read alongside of them? What was the class of people whom he knew was going to see what he wrote? And then I try to construct in my own mind, not by any artificial rule, but by general common sense, so far as I have it, to reconstruct what the meaning would be to the man who read them. That is what you must do in this case.

These words were not to be read by chemists, gentlemen; they were not to be read by botanists; they were not to be read by people who dealt in nice distinctions; they were not to be read by lawyers; they were to be read by bakers and confectioners, plain men accustomed to use language—not with the nice accuracy of a trained expert, but as ordinary men do. And so when you come to find out what this meant, I apprehend that you won't understand that the people who read this were people who would dissect all the language bit by bit.

The language which is criticised here by the Government is that which is a part of this printed matter below the line "Creamthick," which I show you now. It goes down in three paragraphs of some length. You are entitled, in order to determine the words in question, to take the whole of them, and say what the sentiment of those words was; what the plain men, when they read this, would understand the man meant who put it on. He first says that this substance is smooth enough for cream, and is meant to take the place of whole eggs in ice cream, or egg whites in ice cream, and so forth; that it entirely replaces gelatine. Then comes the words, "It is guaranteed to be a pure food preparation, to contain no gelatine or egg albumen or similar articles."

Now, if he had stopped at the words "Or similar article," the Government would not have objected to it here, because it does not contain gelatine, albumen, or egg albumen. But he went farther than that. He said, it contained nothing of the sort. That is one interpretation—one possible interpretation of the language, and it would be important, if it rested with me, which it does not, to determine the meaning of these words.

Supposing he had said, "It is guaranteed to contain no gelatine, egg albumen, or anything of the sort." Now, did that mean that it might contain this gum chadya? That is the whole case in a nutshell.

Did it, to the ordinary baker and confectioner, include gum chadya? We know now that this gum arabic and gum chadya have certain different properties; a chemist will tell you that they are different. I should say that they have actually different properties so far as water absorption is concerned, because this gum chadya is a much greater water absorber, though not any more than gelatine, and gelatine is used next to gum arabic in this label. But it is true, nevertheless, that it has a water absorption very much greater than gum arabic. But when he said, gelatine, gum arabic, or egg albumen, would anyone think, who would read those words, that he would put in another kind of gum, a water absorbing gum, which will act better toward making the ice cream hold up in a solid block underneath than gum arabic?

I take it that we must assume that he supposed that the bakers might think that the gelatine and gum arabic and egg albumen were things which were used in substances of this sort. It would be a reasonable inference to suppose that he must have thought so, if he indicated as one of the merits of this preparation that it did not have any of them. When he grouped those three together, and then said this had not anything of the sort, did he lead anyone to suppose that it did not include something like this gum? That is the whole case. That, gentlemen, is the question of fact, the meaning of the language, and the character of the substance, which is entirely in your hands. You are the final arbiters of that fact. In this case it is the meaning of the language itself.

You must find—I think I have told you this in other cases in this term—that question of fact against the defendant beyond a reasonable doubt. That is to say, if you have any doubt on the subject which is not purely a fictitious one, you must bring in a verdict of not guilty. If it seems to you quite clear that the ordinary people, plain men in the trade who used and read those words would think that it did not have any of the gum, gelatinous gum, then the defendant is guilty, but if when he said that it did not contain gum arabic, that did not include that kind of gum, then your verdict must be in favor of the defendant.

In other words, to convict you must find that this gum was similar to gum arabic in the minds of men who would buy this stuff; that they would read gum arabic and this gum chadya as similar. If you can determine that, it is of no earthly consequence whether there is a chemical difference or not.

Now, gentlemen, there is one question in the case that I want to take up and disabuse your minds of, because I must say that I made an error on it yesterday, and I am going to try to impress upon you what I say now, so that by no chance will it injure the defendant. I permitted yesterday proof of a prior conviction of this defendant under the Pure Food Law. That was a mistake on my part. There are some cases where conviction involves moral turpitude on the part of the witness, which we allow in to impeach his general credibility. That is rather a ponderous way of saying that we allow proof that he had been convicted of immoral acts, so the jury may consider

whether he is worthy of belief. By this conviction was a prior conviction under the Pure Food Law, and was not such a conviction as that. The reason is, a very good common sense one, because it does not necessarily involve any immoral act on the part of the defendant. A man may be convicted under this act for carelessness in branding, which does not involve his knowledge that he was misleading any one. And so it would be very unfair to the defendant if you should consider that conviction against him. You have no right to consider it in weighing his testimony, and you under no circumstances would have any right to reason in this way: "Because he has been convicted once of violating this act, therefore it is likely he would do the same thing again." In the first place, it has no logical bearing on the facts of the case. You know all the facts here. All you have to do now is, independently and of your own will, to make up your minds about the meaning of that language. So I lay that question out of the case.

There are some questions which I have been asked to charge you, and I will go over them now, gentlemen, and perhaps I will think I have not covered some of them.

I will charge you in that order to find the defendant guilty, you must find that this product contained gum chadya, and that the gum chadya was similar to the gum arabic—I have already told you that—I mean, find it similar in the sense in which that word is used on the label. You must find the label to be misleading. I think I have covered that word. And, that it was calculated to mislead and deceive the purchaser. It is true that some evidence was introduced to the effect that he never had misled a purchaser, but that in so far as purchasers never may have found out that gum chadya was here, such evidence was not very important.

Mr. Carlin suggests to me that I tell you that the test is not between this gum and gum arabic as put into the mouth but as it is put into the stomach in ice cream, or the other article mentioned on the label. I think that is true. No one expects this gum to be eaten as gum—it is mixed up here with flour, and then the whole substance is added to milk and made into ice cream.

UNITED STATES v. 36 BOTTLES OF LONDON DRY GIN. (TWO CASES.)

(District Court, E. D., Pennsylvania, May 15, 1913.)

205 Fed. 111; N. J. No. 2820.

An article labeled "London Dry Gin" held not misbranded as to place where manufactured or produced.

Libel under section 10 of the Food and Drugs Act. Jury trial. Verdict for claimant. On motions for new trial. Motions denied.¹

On January 8, 1912, the United States Attorney for the Eastern District of Pennsylvania, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel for the seizure and condemnation of three cases each containing 12 quart bottles of gin remaining unsold in the original

¹ Reversed on writ of error in Circuit Court of Appeals, Third Circuit, p. 695, *post*.

unbroken packages at Philadelphia, Pa., alleging that the product had been shipped on or about December 19, 1911, and transported from the State of New York into the State of Pennsylvania, and charging misbranding in violation of the Food and Drugs Act. The product was labeled "Sir Robert Burnett & Co. Celebrated Trade Mark London Dry Gin Distilled in New York, as at Vauxhall Distillery, London, in glass stoppered bottles which will entirely prevent any possibility of discoloration or loss from evaporation. By this arrangement corkscrews are entirely superseded. Direction.—The stopper is taken out by pressing the thumb first on one side and then on the other." (Blown in bottle) "Sir Robt. Burnett & Co. London Dry Gin."

Misbranding of the product was alleged in the libel for the reason that it was labeled and branded so as to purport to be a foreign product when not so, in that each of the bottles bore a label in substance and character as set forth above by virtue of which said label and brand the article purported to be a foreign product, to wit, a product of London, in the Kingdom of Great Britain, whereas, in truth and in fact, the said article of food was not a product of London, in the Kingdom of Great Britain, but had been produced in the city of New York, in the State of New York, in the United States of America. "

On February 2, 1912, Sir Robert Burnett & Co. (Inc.), claimant, New York, N. Y., filed its demurrer and exceptions to the libel, which were argued on February 5, 1912, and on February 7, 1912, the exceptions to the libel were overruled, without prejudice, as will more fully appear in the following opinion by the court:

MCPHERSON, *Circuit Judge*. With nothing whatever before me except the libel and the claimant's objections (whether they are named exceptions or demurrers is of slight importance), I do not think I should decide now that this libel is either sufficient or insufficient. The district court in Michigan (*United States v. Schurman*, 177 Feb., 581) evidently had affidavits before it showing certain facts which influenced the decision; the ruling does not rest upon the mere language of the libel.

The objections are overruled, but without prejudice, etc.

On October 22, 1912, claimant's answer to the libel was filed and on October 23, 1912, an amended libel was filed in which it was charged that the product was further misbranded in that it was labeled and branded so as to deceive and mislead the purchaser thereof and to purport to be a foreign product when not so, in that the principal label thereon, as hereinabove set forth, was in resemblance and similitude as to arrangement and design to a label and brand which had theretofore been widely used and was well known to the trade in connection with and as theretofore borne upon a genuine imported gin, the product of, and represented to be the product of London, England, which resemblance and similitude as aforesaid was calculated to deceive and mislead the purchaser of the said article into believing that said article was the product of London, England, and by virtue of which said resemblance and similitude the said article purported to be a foreign product, to wit, a product of London, England, whereas it was not a product of London, England, but was a product of the United States of America.

J. B. McPHERSON, *Circuit Judge* (charge to the jury).¹ My instructions to you will be very brief, because I think you will probably have seen for yourselves, from the discussion to which you have listened, that this is a comparatively narrow question. Indeed, I may leave out the adverb and say that it is a narrow question. The Government's case depends entirely, I may say—certainly it depends essentially—upon the sense in which the word "London" is used upon this label. The label that is complained of speaks of "London Dry Gin." It also adds—I forget the precise phrase—"Distilled in New York," I think, "as in Vauxhall, London." But the Government's complaint is essentially based upon the use of the word "London" in the phrase "London Dry Gin"; for evidently if there was no such word upon the label, the Government would have no case. If the label simply said "Dry Gin" there would of course be no case here.

Now this proceeding has been brought under the pure food law, to which reference has been made, and it is not the ordinary civil suit, neither is it the ordinary criminal suit. It occupies a place between those two proceedings. It is a suit to enforce a penalty, and it was begun on the part of the United States by seizing the property that is, in effect, before you now. Two seizures were made, but the cases are being tried together. Each of them concerns three dozen bottles of this gin. The attempt is made by the Government to forfeit that property, that is, to take it away from the claimants, this company which is defending the suit, and to destroy it, or to take some other means of disposing of it; at all events, to forfeit and take it away from the claimants. Now that is a remedy which is severe. It is an unusual remedy to be invoked. The ordinary suit is a proceeding with which you are entirely familiar, where two citizens meet each other in court to dispose of a difficulty between them and which is settled according to the ordinary methods of procedure. There the plaintiff is only obliged to make out his case by the fair weight of the evidence, and, if he offers evidence which is better than his opponent's, even if it is only slightly better than his opponent's, he is entitled to his verdict. That is what we mean, as you know, by the fair weight of the evidence, or preponderance of the evidence. That is the rule in a civil suit. Now if a man is charged with a crime, a much more severe burden is imposed upon the Government in that case; for the Government is always the complainant in a criminal suit. The Government is there obliged to make out its case by evidence that is much stronger; that is, evidence beyond a reasonable doubt. I need not dwell upon that. You have often, no doubt, in your experience in courts, been instructed with regard to that matter. Now the case we are trying comes between these two kinds of cases. It is much more severe than the first remedy and it is not as severe as the second, because there is nobody here charged with a crime and no punishment can be inflicted upon any person in consequence of the verdict. But the result of the verdict, if in favor of the United States, would be to take this property away from the owner and, therefore, the remedy is a severe remedy, and, as I think, the rule with regard to the burden upon the Government is also heavier than if it were an ordinary suit between

¹ Not published in Federal Reporter. See N. J. No. 2820.

individuals. I think the Government is bound to offer evidence that is—what language shall I use? Clear and satisfactory has sometimes been said; clear and convincing is another way in which it has been put. I am aware that I am not giving you very definite ideas upon the subject, but the nature of the subject is such that I can not give you definite and positive ideas. I must use general terms to describe it, and I do not know that I can do better than to say that the Government must offer better evidence than just the mere weight, if you were weighing, if you were deciding between parties. It must be stronger and better evidence than that and I have already said, and I say it again, that it must be clear and satisfactory, or clear and convincing, and with that I shall leave it. If the evidence is not, in your judgment, of that character, then the Government has failed to offer the kind of evidence which the law lays upon it, requires it to offer, and your verdict would have to be in favor of the defendant.

Now that brings me to what I desire to say with respect to the charge itself. The Government puts the charge in two different ways. The evidence is substantially the same as to each, but they rest upon different provisions in the statute and they do differ, in my judgment, in a certain degree. One of the charges which the Government lays before you in each of these cases is based upon the provision of section 8, which refers to "any food product which is falsely branded as to the State, Territory or country in which it is manufactured or produced," and the Government has, in part of its written charge, declared that this article was falsely branded with regard to the country where it was produced. Now that charge may be made out by evidence which shows that the label does not tell the truth with regard to the country where the article was produced. It makes no difference whether that failure to tell the truth was the result of design or was merely unintentional or accidental. The act of Congress has chosen to punish the failure to tell the truth on that subject and, therefore, if this label does not tell the truth with regard to the country in which this gin was produced, then the Government has made out its case under this particular portion of the statute.

Now, as I have said, the case of the United States rests essentially upon the use of this word "London" in connection with the words "Dry Gin." What, then, does "London Dry Gin" mean? This is a question of fact which I intend to submit to you. Does it mean a particular kind of gin, entirely irrespective of the place where the gin was manufactured, or does it mean gin that was made in London? You have heard in argument various suggestions upon one side or the other about that; for example, Saratoga potatoes. Nobody supposes that that means potatoes made in Saratoga. French fried potatoes, if I may continue the use of that vegetable—nobody supposes they are fried in France; and so one might go on. On the other hand, there are words that have a geographical meaning and have no other. I will not give any examples of them, for fear I might not get one that was exactly right, but, as you know perfectly well, there are such words, pure geographical words, that have that meaning and have no other. Now the Government says that this word "London" in this phrase "London Dry Gin," means, geographically, that the gin was produced in London and was not produced anywhere else.

On the other hand, the case of the defendant is that this word has come to have, in the course of usage, a meaning which is not geographical, but refers to the qualities and the kind of article which has been produced here before you. Now what is the fact? I submit it to you for your determination. If this word in this phrase "London Dry Gin" has come to have a meaning in reference to the kind of article and does not refer to the place where it was made, then the Government's case entirely disappears and your verdict would have to be in favor of the defendant. I shall not go over the evidence. It would be superfluous, as it has been discussed and you only heard it yesterday. As you will recall, there is evidence on both sides of that question, and you must take the evidence and decide for yourselves what the fact is as to that subject.

Now, that is the first charge that is presented here by the Government. The second differs essentially in this respect: The Government charges that this label was framed for the purpose of deceiving and misleading the purchaser. Now you see that introduces an element we have not in the first charge, namely, the intention of the person that made the gin, the distiller of the gin. What is the fact in that regard? The evidence that has been offered here upon one side or the other—I mean with reference to the other branch of the case—has some bearing upon this branch also and, in addition to that, there is evidence that has a bearing only upon this branch of the case, namely, the evidence offered by the defendant with regard to what took place before the Secretary of Agriculture and before one of the agents of that department in New York. That, in my judgment, bears upon the question of intention and I submit it to the jury, for their determination, to be weighed by them in that regard. Taking all the evidence, then, upon the subject—and I think all the evidence in the case bears upon the second branch of it, namely, the intention to deceive; the character of the label itself, the type in which it is printed, the communications and proceedings before and with the Department of Agriculture and all the other evidence in the case upon the subject—decide whether or not the second branch of the Government's charge has been made out, namely, that this label was adopted and has been used for the purpose of deceiving and misleading the purchaser.

Now that is the case before you which is to be made out by the Government on one or both of those charges, by the quality of evidence to which I have referred; and, in order that we may know with definiteness just what your conclusions may be, I shall ask the jury to answer these questions as part of their verdict, no matter whether they find in favor of the United States or find in favor of the defendant. The questions are so framed that you can answer them either yes or no. There are only three of them, and they are brief.

The first question is: Is there a distinct kind of gin known as London dry gin? The answer to that will be yes or no.

The second question is: If there is, must this kind of gin be made in London and nowhere else? Of course, you can answer that also yes or no.

The third question refers more particularly to the second charge of the Government. It is this: In using the label in suit, did the maker of the gin intend to deceive or mislead the purchaser by rep-

resenting the gin to be a foreign product when, in truth, it was not a foreign product? That you can answer yes or no. I am not going to ask you to remember these questions. I will give them to the foreman.

Mr. Johnson has just called my attention to what he supposed to be an omission, namely, that I had not referred to the fact that the label contained the words "Distilled in New York as in Vauxhall, London." But, as you remember, I did so allude to it, but I mention it again in case there is to be any doubt on the subject. Besides, you will have the label before you, so that you can inspect it for yourselves.

I answered the defendant's first point in the charge and the second point I refuse.

Mr. BRINTON. May I record an exception? It is rather a statement to the court than an exception. The Government most respectfully excepts to that portion of the charge which advises the jury that the Government's case relies almost entirely, or practically entirely, upon the use of the word "London," for the reason that the Government relies equally upon the charge that the label used by the defendants is in similitude and resemblance to the imported label, and, in this connection, the Government respectfully urges that the court has adopted a view of the second charge of the libel which is not the meaning which was intended to be given to it, or which it holds, or should hold. The second charge of the libel charges that

the principal label thereon as hereinabove set forth was then and there in resemblance and similitude as to arrangement and design to a label and brand which had heretofore been widely used and was well known to the trade in connection with and as theretofore borne upon a genuine imported gin, then and there the product of, and represented to be the product of, London, England, which resemblance and similitude as aforesaid was then and there calculated to deceive and mislead the purchaser of the said article into believing that the said article was the product of London, England, and by virtue of which said resemblance and similitude the said article did then and there purport to be a foreign product,

and the Government submits that that charge does not raise an issue of intention, but the issue as to whether this similitude between this label and the foreign label is, in itself, calculated to lead persons to believe that the article is a foreign product and, therefore, that it purports to be such. It certainly was not the intention to charge intention, as the Government conceded that is not the issue in this case.

The COURT. In response to what the Government has said, if I did not allude to the foreign label, it was because I did not hear it much alluded to in the course of the trial or in the argument; but I am glad to have my attention called to it, and I say to you distinctly that, as the foreign label, that is the label on the foreign product, has been introduced in evidence here, it is before you for purposes of comparison with the domestic label and in order that you may give such weight to it as you think it ought to have in connection with the other instructions that I have given you. I decline to say to you that the intention of the defendant is of no consequence in this matter. If I understand what the implied meaning of the words "deceive" and "mislead" is, it necessarily means that there is an intention to lead somebody astray. I can not understand that you could talk of someone deceiving another unless he was intending to

do it. Besides, the first part of this section, section 8, under which the first charge of the Government is drawn, I have explained to you, and that would cover a case where the mere facts were of the kind I have alluded to and where there was no question of intention in it at all. I can not see the point of having these two charges brought by the Government unless they were intended to be different, and, upon the construction just suggested to me, they are the same.

Mr. BRINTON. The Government respectfully excepts to the submission by the court to the jury of the question substantially to the effect as to whether there is a distinct kind of gin known as London dry gin, submitting that the question, if such a question is to be submitted, should be to the effect as to whether there is a distinct kind or type of gin known generally throughout the trade of the United States as London dry gin.

The COURT. With regard to that suggestion, which is now made for the first time, I say that I think there is a good deal of force in that, as this gin in question was offered to the American public, and I accept the suggestion of the United States in that respect and you may so consider it.

The point for charge presented by the defendant, which was refused by the court without reading, is as follows:

2. Under all the evidence, your verdict must be for the defendants.

The jury found for the claimant.

On April 30, 1913, a motion for a new trial was filed on behalf of the United States and on May 15, 1913, a new trial was refused, as will more fully appear upon the following opinion by the court:

J. B. McPHERSON, *Circuit Judge*. [111]¹ It can hardly be doubted, I think, that the Government's treatment of the claimant in this dispute leaves something to be desired. In consequence of a difference of opinion between the Department of Agriculture and the claimant and concerning the label now in question, the subject was discussed and considered, and in the end the department announced distinctly that the objection of misbranding would not be taken. The claimant thereupon proceeded to use the label for nine months, when the department changed its mind without previous warning, and, without giving the claimant an opportunity to conform to its new attitude, made two separate seizures, taking the position now that the bottles *were* misbranded. Under the circumstances, this seems rather drastic action and can hardly be commended; at all events, it leaves the Government without apparent equity in its favor.

Neither, I think, is any legal support left, in view of the special findings that accompanied the general verdict. The indispensable basis of the attack upon the label is the averment that "London Dry Gin" is a descriptive phrase, which points to the place of origin, and not the kind of liquor. If, however, "London Dry Gin" describes a well-known liquor, having certain characteristics that identify it wherever it may be made, the Government's case is wholly without foundation, no matter under which clause of section 8 of the Food and Drugs Act (act June 30, 1906, c. 3915, 34 Stat. 771 [U. S. Comp. St. Supp. 1911, p. 1357]) the seizure may be defended. And

¹ Numbers in brackets refer to pages of Federal Reporter.

this is precisely the point upon which the evidence conflicted, and is precisely the point determined by the jury in two special findings that make part [112] of the verdict. Two of the questions put by the court and the answers thereto are as follows:

1. Is there a distinct kind of gin known as London dry gin?—Answer. Yes.
2. If there is, must this kind of gin be made in London and nowhere else?—Answer. No.

These findings, I think, conclusively repel the charge of using a label forbidden by the act; and (if the claimant had a right to use the label) it is immaterial to consider the questions raised by the Government upon the subject covered by the third question and answer:

3. In using the label in suit, did the maker of the gin intend to deceive or mislead the purchaser by representing the gin to be a foreign product?—Answer. No.

Of course the verdict does not and cannot, lay down a general rule even in reference to this particular phrase. The jury necessarily acted upon a certain amount and quality of evidence, and as this might not be present in another dispute with another claimant the verdict can do no more than settle the one controversy that was in issue.

Although the instructions to the jury concerning the quality of evidence required to make out the Government's case are not complained of, I may say briefly that a difference of opinion on this subject no doubt exists. A decision by the court of appeals in the fourth circuit—*Grain Distilling Co. v. United States*, 24 Treasury Decisions, (Mar. 13, 1913) p. 74, No. 1837—having been called to my attention, I may cite a recent opinion in the contrary sense by the court of appeals in the second circuit—*United States v. Regan*, 203 Fed. 433.

The motion for a new trial in each case is refused.

UNITED STATES v. McCONNON & COMPANY.

(District Court, D. Minnesota, May 22, 1913.)

N. J. No. 2853.

A compound composed of vanillin and coumarin and burnt sugar, labeled "Extract of Vanillin and Coumarin. * * * Burnt Sugar Color" and not plainly labeled so as to show that it was a "compound," held adulterated and misbranded.

Information alleging violation of the Food and Drugs Act. Jury trial. Verdict of guilty.

This was an information against McConnon & Company, a corporation, Winona, Minn., alleging shipment by said company in violation of the Food and Drugs Act on July 10, 1911, from the State of Minnesota into the State of Tennessee, of a quantity of so-called McConnon's Extract of Vanillin and Coumarin which was adulterated and misbranded. The article was labeled: "McConnon's Extract of Vanillin and Coumarin. Alcohol 24%. Net contents from 4½ to 4¾ oz. Burnt Sugar Color * * *."

Adulteration of the product was alleged in the information for the reason that it purported to be, and was represented by the labels,

to be an extract of vanillin and coumarin, whereas in truth and in fact it was a compound of vanillin and coumarin, mixed and colored with burnt sugar in a manner whereby the inferiority of said product was concealed. Misbranding of the product was alleged for the reason that the labels and brands thereof contained and bore a statement regarding said article which was false and misleading in that by said labels and brands the article purported to be, and was represented to be, an "Extract of Vanillin and Coumarin. Burnt Sugar Color," whereas, in truth and in fact said article was not an extract of vanillin and coumarin, but was a compound of vanillin and coumarin, artificially colored with burnt sugar in imitation of vanilla extract. Misbranding was alleged for the further reason that the product labeled and branded as aforesaid purported to be, and was represented to be, an extract of vanillin and coumarin, whereas in truth and in fact it was a compound of said substances with burnt sugar color and prepared in imitation of vanilla extract and was offered for sale without being labeled as an imitation of vanilla extract. Misbranding was alleged for the further reason that the product purported to be and was represented to be an extract of vanillin and coumarin, whereas in truth and in fact it was a compound of vanillin and coumarin and was not labeled and branded so as to plainly indicate that it was a compound, with the word "compound" plainly stated upon the packages in which it was offered for sale.

MORRIS, *District Judge* (charge to the jury). The defendant company in this case stands here charged with the violation of what is known as the Pure Food and Drugs Act, passed by Congress on the 30th day of June, 1906. It is charged with violating this act in two respects. First, with violating the section against misbranding of articles of food; and second, with violating the section of the act against adulteration of food. The charge rests upon the label placed upon the bottles of the preparation here in question. The first count in the indictment charges a misbranding, and the section of the law, as far as it is necessary to be considered here, is as follows:

That the term misbranding as used herein shall apply to all articles of food or articles which enter into the composition of food, the package or label of which shall bear any statement, design or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, * * *

That for the purposes of this act an article shall also be deemed to be misbranded * * *

In the case of food, first, if it be an imitation of another article; second, if it be labeled or branded so as to deceive or mislead the purchaser." The third subdivision I need not read.

And fourth, if the package containing it or its label shall bear any statement, design or device regarding the ingredients of the substances contained therein, which statement, design, or device shall be false or misleading in any particular.

The defendant stands here charged with having violated that section of the act, in that, in this label he has caused people to buy what is in reality an imitation of another article, to-wit, vanilla extract or extract of vanilla. In this first count it is also charged that by this label this preparation was so labeled as to mislead purchasers, and

third, it is charged that the label and brand contain statements regarding the ingredients contained therein, which statements are false or misleading. Those are the three particulars in which this act is alleged in this information to have been violated in the misbranding. In this information it is also charged that this preparation was adulterated, and thereby violated this provision of the act, "That for the purposes of this act an article shall be deemed to be adulterated if it be colored in a manner whereby inferiority is concealed."

Then first, as to the misbranding that is charged. You know what the label is, the bottle is there and the label is on it. It is charged that that label is such that it causes people to believe that it is something that it is not. In other words, that the label makes this preparation an imitation of another article, that is, an imitation of vanilla extract. Also, that the package is so labeled as to deceive or mislead the purchaser; and third, that the label contains a statement in regard to the ingredients or substances contained therein which is false or misleading.

The object of this act, as has been stated by counsel on both sides, is twofold. First, to prevent people who have articles to sell from placing in them ingredients that are injurious or deleterious to the health of people, and causing them to buy without knowing that fact. Now, as far as this information is concerned, that may be left out of the question, because there is no charge and no proof of that; indeed, it is admitted here in court that there is nothing in this preparation which is injurious to the health of anybody. So that we pass to the second object of this act, and that is the one which it is charged here this defendant has violated. The second object of the statute is to prevent people from so labeling an article that a man buying it will think that he is buying one thing, when in reality he is buying another. In this case the charge is that this label is so made that people purchasing this preparation would think, and would have good reason to think, and the label would lead them to believe, that they were buying vanilla extract, when in truth and in fact they were buying something else, to-wit, a preparation, whether we call it an extract or a compound or a mixture, made of vanillin and coumarin and burnt sugar. So that it seems to me the whole of this case simmers down to one proposition, and that is this: Is that label so worded and so printed, taking it as it looks and as it is, the type on it and everything about it, and in connection with the color of the preparation—is that label such that a purchaser of this article would think, and have reason to think and believe, when he reads the label, that he was buying vanilla extract, when he was in fact buying another thing? The whole question simmers itself down to that.

As to the misbranding; is that article so branded, first, that it is an imitation of vanilla extract; that people buying it and looking at the brand, and looking at the article, would think that it was vanilla extract? That is the first charge. Second, Is this so branded as to deceive and mislead anyone buying it into the belief that he was buying vanilla extract, when in fact he was buying another mixture? And, third, does it contain a statement which is false or misleading?

You cannot say that the label is false, unless the word "extract" makes it false; that I shall come to hereafter. As to its ingredients, you cannot say that the label is false, because the label says that it does contain vanillin, that it does contain coumarin, that it does con-

tain burnt sugar, and that it does contain alcohol. These things it says it contains. But is it misleading? Is it misleading in that it has the words extract of vanillin and coumarin colored with burnt sugar and with so much alcohol in it? Is it misleading by reason that the word extract is used instead of some other word, as, for instance, compound or flavoring, or some word other than extract? Does that make it misleading? Would that make a man going into a store and buying it, or buying it from a traveling vendor, looking at that label, think that he was buying extract of vanilla which is extracted from the vanilla bean—not something made from a composition or extract of vanillin and coumarin, but an extract of the vanilla bean? Would the words used on that label, in the connection in which they are used, considering the color of the preparation that is in the bottle, would that make a man buying it believe that he was buying vanilla extract? That is the whole question.

Now, I come to the word extract. This label must be taken as meaning what would be ordinarily understood by the public in reading it. The ordinary and customary meaning given to the word is what should govern you in determining this question, and not the technical meaning of it. What impression, in other words, does that label produce upon the mind, your mind and my mind, when we go to buy that preparation? What impression, what meaning? That you must determine from all the testimony which has been offered here with reference to that question.

Extract of vanillin and coumarin, what meaning does that convey to our minds, the ordinary mind? What meaning does it convey to people who go and buy a bottle of flavoring for food? If that label, framed as it is, worded as it is, would cause an ordinary man to believe that he was buying vanilla extract, then this defendant is guilty. If it would not, then the defendant is not guilty, that is, on the first count of this information. That is the whole question. Take that label now as it stands, as it is, look at it with the wording on it and the coloring of the mixture in the bottle, would that cause the ordinary purchaser who wanted a flavoring extract to think and believe, and have good reason to believe, that he was buying vanilla extract, and not a compound of vanillin and coumarin with burnt sugar in it? If it would so mislead that purchaser, then that bottle is mislabeled and misbranded under this act, and this defendant is guilty. If it would not, then this defendant is not guilty, upon that proposition.

Now as to the adulteration part of it. "An article shall be deemed to be adulterated according to this act, if it be colored in a manner whereby inferiority is concealed." And this brings us right back to the same question. Does the coloring cause a man to believe when he wants vanilla extract that he is getting that or something that is not inferior to vanilla extract? Do I make myself understood? Does the coloring in that bottle with that burnt sugar so operate that it would cause a man buying it, when he wanted vanilla extract, to think that it was the superior article and to get something which without that coloring he would have thought was an inferior article? That is the question on this second count. If that coloring matter does do that then this defendant is guilty on the second count; if it does not then it is not guilty.

So after all, it comes down to a single question as to whether or not the purchaser of that article has been deceived into buying a preparation of vanillin and coumarin when he thought he was buying extract of vanilla. That is about all there is of this case. A man has a right to use coloring matter in any article, provided that the coloring matter is not employed to imitate any natural product or another product of recognized name and quality. If this defendant employed that coloring matter for imitating the vanilla extract, and making people believe that they were getting vanilla extract, then it was employing it to imitate the natural product or some other product of recognized name and quality. That is where this coloring matter comes in. It comes in as bearing upon the intention of this defendant, as bearing upon the natural result of that labeling in connection with the coloring matter.

Now, as to whether this defendant put that label on the bottle with the intention of causing this deception. If the putting of the label on the bottle must naturally and probably have produced that result, a man is held to intend to produce the natural and probable results of his action. Of course, if you believe from the evidence that this defendant colored that mixture and put that label on it with the actual intention of deceiving people who might buy it, then he violated this law. If the natural and probable result of putting that coloring matter in there and that label on the bottle would be to mislead the public, and to cause a man to think that he was buying vanilla extract when he was buying something else, then the defendant would be held to intend the natural and probable result of what he did even though you may not believe that such was his actual intention. That is all there is of this case.

This defendant stands here charged with an offence, which while it is a misdemeanor, gives him the right to the same degree of proof that he would have a right to in any criminal action. The facts which are necessary to be proved in order to convict him must be shown beyond a reasonable doubt, and the evidence must satisfy you beyond a reasonable doubt either that the defendant intended to accomplish the deceit, or that the natural and probable result or tendency of the label was to accomplish such deceit. The evidence must show and satisfy you of either of these matters beyond a reasonable doubt. I cannot give you any definition that would clear up what we mean by a reasonable doubt. The law writers and the judges have been trying to do that for a long time, and after all they get back to the words reasonable doubt. Those words mean exactly what they say; a reasonable doubt, not an imaginary or fanciful doubt, but a doubt such as you would act upon in the most important affairs of your own life. A doubt coming out of the evidence; a doubt arising from the evidence; not one that can be conjured up by the mind, not an imaginary, not a fanciful one, but a reasonable one. That is what it means. That doubt must be based upon the testimony. The Government must establish the fact of the defendant's guilt beyond a reasonable doubt. If this testimony does not so satisfy your minds, then this defendant is entitled to an acquittal. But, if it does so satisfy your minds, then there should be a conviction, and the defendant should be found guilty as charged

either in the first or in the second count, or as in the entire information.

I have been talking to you about 15 or 20 minutes, and have got back to the original proposition. All there is in this case is, did the defendant intend to accomplish a deceit, or was the natural tendency of this label to accomplish a deceit? Was that label such, taken in connection with the coloring of the product, taken in connection with what you believe to be the customary meaning of the word extract—was that label such that it would naturally and probably cause a purchaser of that preparation to believe that he was buying vanilla extract when he was buying this preparation which is not vanilla extract? That is the whole thing.

The only way I can aid you in deciding that question, is put yourself in the place of a purchaser who wanted to buy a flavoring extract, an extract that would give the peculiar fragrantcy and delicious aroma that a product of the vanilla bean gives, that we all know vanilla gives. Put yourself in the place of a man buying and being presented with that bottle with that label on it, with that coloring in it, and ask yourself the question, "Would I be deceived when I read that label into believing that I was buying vanilla extract?" If you believe that you would be or that an ordinary purchaser would be so deceived, then this defendant is guilty; but unless you are satisfied of that fact beyond a reasonable doubt, then this defendant is not guilty, and should be so found by any man who comes to that conclusion.

That is all, so far as I can see, that there is in this case. I have been presented with a number of instructions, but I think that I have got the law boiled down, and I think I have got this case so that the jury understands it. Put yourselves in the place of a man buying a bottle of flavoring fluid—that is what this is intended for—to flavor food. Ask yourself, if a man comes to sell me that preparation—I look at it and read the label, I examine the color; would I be deceived into believing that I was buying vanilla extract instead of something else? That is the whole question.

Now, gentlemen of the jury, you have heard all the testimony and you will decide the case upon the testimony that has been offered here in court. There has been a whole lot of it; some of it I have not quite understood, I do not know whether you have or not, most of it I have. But, gentlemen, all these witnesses have been very frank, especially these scientific gentlemen; they have acted like men who are standing upon scientific principles. They have been frank and open, they have been clear, and if any part of their testimony I have not understood, it is not due to them, it is due to my own stupidity, or to my own lack of scientific training perhaps. But from all of this testimony you have got to decide this question. Was this defendant branding an article so that it would make people think, who were buying one thing, that they were buying another? Did the coloring matter in this fluid so change its character from what it would otherwise have been, as to make people believe that they were buying vanilla extract when they were buying something else? That is the whole question for you to decide.

UNITED STATES v. EXCELSIOR BAKING CO.

(District Court, E. D. Pennsylvania, June 12, 1913.)

N. J. No. 2895.

Frozen eggs held adulterated in that they consisted in part of a filthy, decomposed, and putrid substance.

Indictment charging adulteration in violation of the Food and Drugs Act. Jury trial. Verdict of guilty. Motions for a new trial and in arrest of judgment denied.

On September 17, 1912, the grand inquest of the United States of America, inquiring in and for the Eastern District of Pennsylvania, acting upon a report by the Secretary of Agriculture, returned an indictment in the District Court of the United States for said district against the Excelsior Baking Co., a corporation, Philadelphia, Pa., charging shipment by said company, in violation of the Food and Drugs Act, on or about January 5, 1912, from the State of Pennsylvania into the State of New Jersey of a quantity of frozen egg product which was adulterated.

Adulteration of the product was charged in the indictment for the reason that it consisted in part of a filthy, decomposed, and putrid animal and vegetable substance.

On June 12, 1913, the case having come on for trial before the court and a jury, after the submission of evidence and argument by counsel, the following charge was delivered to the jury by the court:

THOMPSON, *District Judge*. The defendant corporation in this case is charged with the violation of what is known as the Pure Food and Drugs Act. The object of that act, as you all are aware, is to protect the consumers from having food or drugs sold to them and delivered to them which are adulterated or misbranded. Under this act it is not necessary to prove the knowledge of a defendant that the article shipped in interstate commerce was adulterated or misbranded. The responsibility is put upon dealers who ship. That is for the protection of the customer. The responsibility is put upon them of shipping only articles that are not adulterated or misbranded.

The charge in this case is that the defendant corporation shipped in interstate commerce from Philadelphia, in the State of Pennsylvania, to Newark, in the State of New Jersey, the egg product that has been testified to in this case, and that the egg product in question was adulterated. Under the interstate commerce act, which is known as the Pure Food and Drugs Act, adulteration is defined in this way, an article is, under the act, held to be adulterated if it consists in whole or in part of a filthy, decomposed, or putrid animal substance. The charge in this case was that the egg product which has been testified to was filthy, putrid, and decomposed. The defendant here is charged, through its president, with having delivered for shipment by the Pennsylvania Company this food product which is alleged to be adulterated.

It seems to me that the first question for you to consider would be whether the product was in fact shipped by the president of the defendant within the scope of his authority as the president of the company, and within the scope of his employment. Upon the wit-

ness stand he testified that he did not make out the shipping order through which this merchandise was shipped, and that he knew nothing about it. You will have to take into consideration the fact that he is an interested party in this case, being the president, and one of the owners of the defendant company, and the Government is, therefore, allowed to contradict his testimony by introducing expert testimony to show that the shipping order upon which this product was shipped, or alleged to be shipped, was in the same handwriting, written by the same person as the other shipping orders which it is admitted he did fill out and sign. So that the first question for you to consider will be the question as to whether that shipping order signed "Frank Riley" was written by the same person who wrote the other shipping orders. You have the testimony of the expert, and you have heard from him the basis on which he expresses an opinion that, without any doubt in his mind, the same person wrote the shipping order in dispute who wrote the shipping orders which are admitted to be the act of the president of the defendant company. The inspection of these documents is also for you. You have a right, with your own knowledge of handwriting, to compare the two. They will be before you for comparison, and if you find from the evidence of the expert, and from your comparison of the handwriting, that the handwriting is the same in both instances, the handwriting of the president of the defendant company, then you have taken one step in the consideration of the case. If, however, upon a comparison of the handwriting and a consideration of the testimony of the expert you are not satisfied that it was written by the same person, then you would be justified in going no further in the case at all, because that is the link which connects the defendant company with the transaction. So that if you are not satisfied that it is his handwriting, written by the same person, you would then return a verdict of "Not guilty." But if, after having examined the writings, you are satisfied beyond a reasonable doubt that the documents were written by the same person, then you will take up the other questions in the case.

Now, it is for you to determine from the testimony, as you have heard it, whether the article which was inspected by the laboratory at Washington, and which has been testified to be adulterated within the meaning of the act, was the food that was shipped from the defendant to the concern in Newark, N. J. You will take into consideration the documentary evidence in the case and the testimony of the witnesses, and if you find from the documentary evidence and from the testimony that this frozen egg product is sufficiently traced from the defendant to the department at Washington, and you find it was adulterated, and you find it was shipped in interstate commerce by the defendant, and it was adulterated within the meaning of the act, then you would be justified in returning a verdict of guilty. You will bear in mind in this case, as in all criminal cases, the defendant is entitled to the presumption of innocence, and it is upon the Government to establish the defendant's guilt beyond a reasonable doubt. When I say "reasonable doubt," I mean a doubt which would arise in the mind of a reasonable man from the evidence, and you are not to be influenced by anything outside of the evidence to determine whether or not a doubt exists; that is to say, no prejudice or whim or anything of that sort should influence you, but you should be governed entirely by the evidence in the case.

I do not know as there is anything further for me to say to you. The documents in evidence will be submitted to you. You can take them out, and you will return a verdict as you think the evidence warrants it.

Mr. BRINTON. Some point was made in the argument about the date of shipment.

The COURT. The fact that there was a discrepancy between the date of the shipping order and that laid in the indictment is entirely immaterial.

I will say to you, gentlemen, there has been some point raised here as to the guaranty under the act. There has been no evidence here to establish any guaranty by the dealer from whom it is alleged this article came to relieve the defendant in this case. The act provides just what sort of a guaranty shall be given, and it is not necessary for me to go into the details of it, but no guaranty has been proved in the case, such as comes within the act.

UNITED STATES v. FIVE CASES OF CHAMPAGNE.

(District Court, N. D., New York, June 23, 1913.)

205 Fed. 817; N. J. No. 3109.

Ordinary, low grade, carbonated white wine, packed in bottles and cases in imitation of champagne and labeled "Extra Dry," held misbranded.

Libel under section 10 of the Food and Drugs Act. Judgment of condemnation.

RAY, *District Judge*. About March 15, 1913, James L. Green, a wholesale liquor dealer of Watertown, N. Y., ordered from Henry H. Shufeldt and Company, of Peoria, Ill., five cases of champagne, and said Shufeldt & Co. shipped and billed to him five cases of so-called champagne to fill the order and same was shipped and transported and received in interstate commerce. Each case contained twenty-four bottles, and [818]¹ each bottle holds about one pint of a liquid mixture which, on due examination and test, is found to consist of a very cheap, ordinary, low grade carbonated white wine. It is not champagne in any sense of that word, but a low grade, cheap white wine charged with gas. It is bottled and labeled in the following manner. The bottle itself is of the same shape and made in imitation of the ordinary champagne bottle. This bottle is corked and dressed about the neck the same as and in very close imitation in every way of the ordinary genuine champagne bottle, or bottle containing champagne; for instance, Mumm's Extra Dry. It has the same style of label and seal, both attached in the same manner. On the label is the name "Special Gold Cabinet, Superior Quality." There is also a coat of arms, and on one side initials "H. H. S. & Co.," and on the other "3015."

In short the bottles containing the cheap carbonated wine are such a close imitation in form, or shape, dress, corking, and label, that the ordinary observer would and does easily mistake, accept, and use the imitation as a genuine bottle of imported champagne. This would

¹ Numbers in brackets refer to pages of Federal Reporter.

and does happen with a large number of purchasers and users, and it may be said with the ordinary user unless he gives the labels an inspection to determine whether it is the genuine champagne bottle. Evidently it is gotten up and dressed and labeled in this way to deceive the ordinary purchaser and user of champagne. The wooden boxes and markings and labels thereon in which shipped also closely imitate the boxes in which genuine champagne is shipped. This is such an imitation as would make a case of unfair competition in trade. The Food and Drugs Act of June 30, 1906, provides amongst other things: "The term 'food,' as used herein shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound. (Section 6.)"

Section 2 prohibits the introduction into any State from another State of any article of food which is adulterated or misbranded within the meaning of this act. Section 8 provides:

That for the purposes of this act an article shall also be deemed to be misbranded: * * * In the case of food: First. If it be *an imitation* of or offered for sale under the distinctive name of another article. Second. If it be *labeled* or branded so as to deceive or mislead the purchaser, or * * *. *Provided*, That an article of food (drink) which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases: First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced. * * *

And

Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends and the word "compound," "imitation" or "blend," as the case may be, is plainly stated on the package in which it is offered for sale.

In this case, there is nothing to indicate to the purchaser that these bottles contain an imitation or that an imitation is intended.

Section 10 provides for the seizure and condemnation of adulterated or unbranded [misbranded] articles while being transported in interstate commerce, [819] or after transportation and while unsold or in original unbroken packages, which is this case.

This wine in question was and is an imitation of genuine imported champagne, and was and is so labeled and branded as to deceive and mislead both the purchaser and users into the belief that it is genuine champagne. Is it within the proviso or exception quoted? It contains no added poisonous or deleterious ingredient or ingredients. It was not and is not offered for sale under the distinctive name "champagne," as that word is not on either bottle, label, or package, if the statute means, by "offered for sale under the distinctive name of another article," that it must be so advertised, or bear on the package containing it the distinctive name of some other article. Even if it has a distinctive name "Special Gold Cabinet," still it is "an imitation of" and was actually "offered for sale" under the name "champagne," which is the distinctive name of another article; that is, "champagne" was ordered, and the seller sent this article as and for champagne, thus not only offering it for sale as champagne, but selling it as champagne. By his acts he represented it to be champagne. Hence this carbonated wine contained in these bottles and packages

is not within the proviso or exception, and must be held to be *misbranded* and subject to seizure and condemnation. It is not sufficient to remove an imitation and misbranded article from the condemnation of this law that it has a distinctive name applied to it, as the very language of the proviso requires that, if known under its own distinctive name (if it has one) it (the article) *must not be either an imitation of another article or offered for sale under the distinctive name of another article*. Here this carbonated wine contained in these bottles and cases was in fact offered for sale and sold under the distinctive name of champagne, another article, and, what is conclusive, was and is, in fact, an imitation of imported champagne. Again, can a *distinctive* name be given to an *imitation* article unless it be to distinguish one imitation from another? Clearly this cannot be done so as to bring a wine made and bottled and dressed in imitation of champagne, and sold and offered for sale as champagne, and delivered to fulfil orders for champagne, within the exception or proviso quoted, when it is so labeled or branded as to deceive and mislead the purchaser.

In this case it is sufficient to bring these cases of wine, the wine contained in these bottles, within the condemnation of the statute, and without the protection of the exception or proviso, that they are in fact "an imitation of another article," viz., genuine imported champagne, and are labeled and branded so as to deceive or mislead the purchaser, and are not labeled, branded, or tagged so as to plainly indicate that they are imitations, and the word "imitation" is not on the package. It must be borne in mind that in stating that this wine was actually offered for sale and sold under the distinctive name "champagne," I do not mean that the word "champagne" was on the bottles, labels or packages, but that the purchaser ordered champagne, and expected to get champagne, and the seller knew this, and supplied this cheap, carbonated wine, put up in these bottles, dressed, ornamented, [820] and labeled in close imitation of champagne, and by these acts represented to the purchaser that he was selling and shipping to him genuine champagne. I think these facts bring the act of the seller within the language of the act, "offered for sale under the distinctive name of another article." Hence I hold that, within the meaning of this statute, this wine was not only offered for sale, but actually sold, "under the distinctive name of another article;" that is, genuine champagne. Again, these bottles containing this wine—that is, the package containing it, both bottles and box—bore designs and devices thereon plainly intended to relate to the contents of such bottles, and indicate to the purchaser and user thereof the nature and character of the substance contained in such bottles. In addition to the marks and words and designs mentioned, there were the words "Extra Dry," indicating a grade of champagne, and these words were a plain misrepresentation and misstatement as to the character and quality of the contents, which were not "extra dry." These designs and devices very plainly said to a purchaser, "champagne," and were intended by the seller to say to the purchaser, "This bottle contains extra dry champagne." These designs and devices were false and misleading. The design and devices and certain of the words on these bottles could relate to the substances contained therein only, and had but one purpose and meaning. It was the purpose of Congress in enacting this, the "Food and Drugs Act, June 30, 1906," to

put a stop to the transportation and sale in interstate commerce of adulterated and misbranded articles of food, drink, and drugs. It was intended to reach all forms of misrepresentation by misbranding, by the use of words, or by the use of designs or devices, pictures, &c., calculated to mislead and deceive, cheat, or defraud the purchasers. If A, in New York, orders of B, in Illinois, one thousand one-pound packages of corn and one thousand packages are shipped and transported from the one State to the other in fulfillment of the order, and such packages have labels reading "Fine Illinois," with the picture thereon, or on the package itself, of an ear of corn, but the packages in fact contain sawdust only, is there or is there not an offer for sale under the distinctive name of another article, and is or is not the package so labeled or branded as to deceive or mislead the purchaser, and does or does not the package containing the sawdust or its label bear a design, or device, regarding the substance contained in such package, which is false or misleading in any particular? What does the picture of the ear of corn on the package say? And, in such case, is there or is there not a violation of the act in question? Having in view the evils to be remedied, the purpose of Congress, and the language of the act, it seems to me there can be but one answer.

A statute, if its wording will permit, is always to be construed so as to make effectual the intent of the law-making body in enacting it. In selling articles of food, including liquids for drinking, frauds on the public may be perpetrated in two ways: (1) by adulterating or artificially coloring it, etc., the article itself; and (2) by putting it in packages or receptacles so formed or labeled and dressed as to induce the [821] purchaser to take it as one article, when in fact it is another. Congress aimed at both modes of committing a fraud on the public.

There will be a judgment of condemnation.

UNITED STATES. v. SPRAGUE ET AL.

(District Court, E. D. New York. July 31, 1913.)

208 Fed. 419; N. J. No. 3295.

An information charging that certain oysters were adulterated in that they "consisted in part of filthy, decomposed, and putrid animal and vegetable substance" held to state an offense under the act.

Information against Smith Sprague and George W. Doughty, alleging violation of the Food and Drugs Act. On motion to quash and demurrer to information. Overruled.¹

[420]² CHATFIELD, *District Judge*. The defendants have been brought into court upon an information filed under act June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1911, p. 1354), known as the Pure Food and Drugs Act. The precise charge is that the defendants, as copartners, shipped from Far Rockaway, N. Y., to the State of Pennsylvania, 10 barrels of oysters, upon the 12th day of October, 1911; that the oysters were "adulterated" in that they "consisted in part of filthy, decomposed, and putrid animal and vegetable substance," and

¹ Defendants subsequently entered a plea of *nolo contendere*, and the court suspended sentence.

² Numbers in brackets refer to pages of Federal Reporter.

that the oysters were an article of food, as distinguished from drugs, etc. The information is sufficient in its general form. The defendants have appeared in court, and interposed a motion to quash the information upon three grounds: (1) That the information does not charge the defendants with knowingly and wilfully doing any of the things mentioned; (2) That the law above referred to does not cover, and was not intended to cover the shipment of oysters, and that a shipment of unopened oysters, in their natural condition, after removal from the water, is not within the language or intent of the sections relating to adulteration; (3) that the papers upon which the information was issued, and which are filed with the information, do not show the oysters to have been, in whole or in part, of a filthy, decomposed, or putrid animal or vegetable substance. The defendants have also interposed a demurrer upon the same grounds above mentioned, [421] alleging that the information does not state facts sufficient to constitute a crime.

It is apparent that some of these questions would be raised properly by demurrer rather than by motion to quash (for the alleged defects are claimed upon the allegations of the information, and argument thereon is based upon its language). The question with respect to the scope of the act, and the motion based upon the physical composition or analysis of the substance in question, can be raised by the motions. In support of the motion to quash, the defendants have relied upon facts which are matters of common knowledge and admitted by the United States attorney, to the effect that the oysters in question were unopened when taken from the waters of a bay in this district by the shippers, and, without any treatment or manufacture, except that of gathering or packing for shipment, were transmitted in a living state. This presupposes that the muscular structure of the oyster has kept the shell closed, and that nothing has been added thereto, or could have been added thereto, except through the application of liquid. It is alleged and admitted that no liquid has been supplied beyond the ordinary water upon or in which the oysters live. In addition, the motion is based upon the allegations of the information that the adulteration complained of consists of bacteria, particularly the bacillus typhosus and other animal and vegetable bacilli, which were admittedly absorbed by the live oyster during its process of growth; that is to say, from the liquid which it consumed in its natural functions. The court will not attempt to differentiate between the points raised by demurrer and those raised upon the motion to quash, other than to state them as they are taken up in order.

As to the objection that the oysters did not consist in whole or in part of filthy, decomposed, or putrefied animal or vegetable substance, no argument would be needed, if living bacilli had been knowingly introduced into an oyster by the defendants, and allowed to reproduce therein. It seems hardly open to argument that the words "filthy, decomposed, and putrefied" would be applicable to certain conditions resulting from the presence of living organisms; and in fact, from common knowledge of the present state of scientific research, the conditions of animal substance known as "filthy, decomposed, and putrefied" are caused by the presence of such living organisms. When we consider a specific bacillus such as that named, whether or not its presence might cause decomposition or putre-

faction raises a question of fact that cannot be disposed of upon this motion, for the degree of decomposition of tissue might be so slight as to render the use of those words inapplicable, from the standpoint of a substance intended for food. But the language used in the statute is in the alternative, and in the information the words "filthy, decomposed, and putrid" are stated in conjunction. A substance containing bacilli liable to cause disease, to such an extent as to make it dangerous for food purposes, is certainly "filthy", under the meaning of that word as generally used, and especially since the result of investigation has shown that filth or dirtiness is dangerous through the germs which it contains, and not solely because of offense to the senses.

[422] The statute prohibits the *manufacture* of any article of food or drugs which is "adulterated or misbranded," and by section 7, subd. 6, the definition of the word "adulteration," for the purposes of the statute, is made to cover a substance consisting in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not. It may be assumed that oysters, while belonging to the animal kingdom, would not be classified as animals. But even if they be treated as fish or mollusk, and assuming that the words "whether manufactured or not" relate only to the clause as to the "portion of an animal unfit for food," the indication is that the certain intent of Congress was to give full meaning to the definition of "adulteration" defined as "consisting in whole or in part of a filthy substance." The ordinary use of "adulteration" implies an actual addition to the original substance, through human agency. But the word as used in the section does not restrict this to addition by the hand of man, and if the adulteration of filthy, decomposed, or putrid substance has been added by nature, and is contained in the article to be shipped, it is adulterated in the eyes of the law.

This brings us to the principal question in the case. The statute makes it unlawful to manufacture any article of food or drug which is adulterated or misbranded within the meaning of this act. If a person, through his servants, makes an article which is in fact adulterated, he is liable for the manufacture, within the jurisdiction of the act of Congress, even though he does not know that the Pure Food and Drugs Law is on the statute book, and does not know that the resultant condition of his process of manufacture has produced a substance which on analysis appears to be adulterated through containing decomposed animal matter. In the same way, he would be liable for a misbranding if the methods employed in his business caused the sending out of goods in violation of the statute. The law further makes any article of food or drugs which is adulterated or misbranded, within the meaning of the act, contraband; that is, the introduction of them into another State or Territory is prohibited. Such goods cannot be transmitted by interstate commerce without rendering the goods subject to seizure and destruction, and under section 10 this of itself shows that the knowledge or intent of the party shipping is not a material element of the situation which is prohibited by the act of Congress. The law further provides that if any person shall ship or deliver for shipment, in unbroken packages or otherwise, an adulterated or misbranded article, or shall offer such for sale, he shall be guilty of a misdemeanor.

The information in this proceeding charges the defendants with having offered for shipment an article which must be held to be adulterated and to be plainly contraband under the law. They are bound by the fact that the law was in existence. They are bound by the fact that they knew that they were manufacturing for shipment, or were actually shipping by interstate commerce, certain packages of oysters, which would be contraband or subject to seizure if found to contain filthy or decomposed matter (that is, "adulterated") within the meaning [423] of the law. Congress has seen fit to impose a penalty for such a violation, and it is no defense to claim that the person causing the violation neither knew at the time that the goods were offensive, nor intended to violate the law. Hence an allegation that the defendants knew that the article was adulterated, at the time that they intentionally and willfully shipped it or caused it to be shipped, would apply only to cases where the adulteration had been placed in the goods by or with the knowledge of the shipper, or where an examination of the article had disclosed its presence. But Congress has gone much further, and in the exercise of its police power has imposed a penalty upon the sending of the deleterious or harmful substance, where the shipper is responsible for the act of sending, even though he may have nothing to do with the condition of the article sent, except as possession or ownership make him responsible. The use of interstate commerce or of means of shipping an article from one point to the other, like the manufacture of an article, or its adulteration with a substance by the person preparing it, is an act which, when alleged in an indictment, need be charged as "knowingly" committed only if the person charged has to be alleged to be in possession of and exercising his mental faculties. Such an allegation is not necessary where, as here, the word "ship" means "cause to be shipped." Where a person intentionally uses or has used means of transportation, under such conditions that he may unwittingly be liable to a fine, then, subject to constitutional limitations, the imposition of the fine for the specific act must be determined solely from the conditions under which the penalty would be imposed, and not from the intent or purpose of the one liable to the fine.

The defendants have cited a number of cases to show that criminal intent requires knowledge or conscious action on the part of the criminal. They argue that a charge in the language of the statute is not sufficient if the act alleged could be innocently done, unless guilty knowledge is present, from which intent would have to be inferred. But this statute compels liability, if the harmful act has occurred through a shipment personally made by the defendant, or for which he is in a business sense responsible as shipper. The extent of the responsibility is left to the court, when considering the amount of punishment. The determination of when the defendant should be held as the shipper of the contraband article is a matter of law, but the fault of indefiniteness, or of failure to set forth what is charged to be criminal, cannot be urged against the present information. The statutory requirements render the matter more definite, so far as limiting or defining the circumstances under which Congress intended that criminal responsibility should be placed upon an individual, and less latitude is given to those enforcing the law (with respect to everything except the amount of punishment) than if a

determination as to the knowledge or information of the defendant were to be entered into.

The conclusion must be that if the person accused is responsible under the statute for the consequences of a shipment by interstate commerce, and if that responsibility carries with it a punishment for [424] violation of some regulation necessary for the safety of health, then the information will lie.

The demurrer will be overruled, and the motion to quash denied.

UNITED STATES v. 13 CRATES OF FROZEN EGGS.

(District Court, S. D., New York, October 20, 1913.)

208 Fed., 950; N. J. No. 2859.

Frozen eggs, consisting in whole or in part of filthy, putrid and decomposed animal substance, *held* adulterated.

Libel under section 10 of the Food and Drugs Act for the condemnation of adulterated frozen eggs. Jury trial. Verdict in favor of the libellant by direction of the court. Decree of condemnation, forfeiture and destruction.¹

This was a libel for the seizure and condemnation of 13 crates each containing 2 cans of frozen eggs, remaining unsold in the original unbroken packages in New York, N. Y., after having been transported from the State of Illinois into the State of New York. The libel charged adulteration in violation of the Food and Drugs Act, for the reason that each of the 13 crates contained an article of food, to wit: Frozen eggs, which being animal substance, was in whole or in part filthy, putrid and decomposed, contrary to the provisions of subdivision 6, section 7 of the act.

RAY, *District Judge*. The claimant, Armour and Company, of Chicago, Ill., having a plant and place of business there, is a purchaser of and dealer in eggs and other food products, not a producer. At Chicago, Ill., it purchased and had on hand these eggs in question and others like them. They were released from the shells and frozen, but by reason of decay had so far decomposed that they were not fit for human food or consumption as such. As unfit for human consumption these with others had been selected and segregated by claimant at Chicago, Ill., from their other eggs. It is conceded that these eggs had reached such a stage of decomposition as to come within the definition and description of "adulterated" articles of food if handled, shipped, or sold, or [951]² intended to be shipped and sold as an article of food. Eggs in this condition may be sold and used as an article of food, or for tanning purposes (that is, for use in the tanning of leather), and claimant had sold eggs of this description, selected and segregated at the same time as these, to a tannery or tanning firm located and doing business at a point not far distant from Chicago for tanning purposes. It had not shipped or sold any of its eggs of this description to be used and consumed as an article of food and did not contemplate doing so.

¹ Affirmed in Circuit Court of Appeals, Second Circuit, p. 709, *post*.

² Numbers in brackets refer to pages of Federal Reporter.

The thirteen crates of frozen eggs seized and sought to be condemned in this proceeding were shipped by the claimant, Armour and Company, in interstate commerce from Chicago, Ill., to New York City, N. Y., where that corporation had and has a warehouse and place of business and had been received there, but had not been sold or disposed of or offered for sale when the seizure was made. There are tanneries in the vicinity of New York, and in fact the intention of the claimant in so transporting these eggs in question from Chicago to New York was to offer them for sale and dispose of them, if possible, at New York for use in tanning and not for use or consumption as food. This intention or purpose of the claimant had not been disclosed in any way or manner to any person or by any labeling or branding. The eggs in question had not been denatured or subjected to any chemical or other process. They were rotten, decayed eggs, unfit for human food, and came within the definition "adulterated" for the reason they consisted in whole or in part of a filthy and decomposed or putrid animal or vegetable substance. See subdivision sixth, section 7, of the Food and Drugs Act of June 30, 1906, 34 Stat. 768.

By section 6 of the act it is provided that "The term food as used herein shall include all articles used for food * * * whether simple, mixed or compound." By section 2 the introduction into one State from another State " * * * of any article of food * * * which is adulterated * * * within the meaning of this act, is hereby prohibited." Section 10 provides for the seizure and condemnation of "any article of food * * * that is adulterated * * * within the meaning of this act" and which, having been transported in interstate commerce, remains unsold, etc.

The contention of the United States is that eggs are an article of food, and that they remain such if not denatured or subjected to some chemical process which *destroys* them as an article of food, and that when they become decomposed and therefore unfit for food they are within the meaning of the act (section 7, subdivision sixth), an adulterated article of food and subject to the condemnation of the act. The contention of the claimant is that while the eggs prior to decomposition were an article of food, when decomposed they have lost their character as an article of food if the owner does not intend to use, transport, or sell them as an article of food but does intend to transport them and sell them for tanning purposes only and transports them for that purpose only. The contention is that an undisclosed intent to transport in interstate commerce and sell decomposed eggs, which are actually unfit for food, for use in tanning only takes the same out of the category of "adulterated article of food."

The difficulty with this contention is that these eggs, or eggs of this [952] character, not denatured, come squarely within the definition of an adulterated article of food. The character of the thing does not depend on the intent or purpose of the owner in transporting it or selling it, or the purpose the owner may have in selling it. It seems to me clear that the purpose of Congress was to prohibit the transportation of articles in interstate commerce which come within the definition given in the statute and make them subject to seizure and condemnation if so transported. If such is not the purpose, then interstate commerce may be flooded with eggs of this character and the

Government will be compelled to prove that the intent of the one transporting the article was to use or sell same as an article of food. Even if the burden is not shifted and the presumption is that it was intended to use or sell such an article as food or as an article of food, still the owner so transporting the article will escape the operation of the statute by swearing to an undisclosed intent which the Government will be unable to disprove, unless the article has been actually put on sale or sold as an article of food. If these eggs had been denatured so as to destroy them as an article of food (that is, take them outside the statutory definition of "adulterated" article of food), the case would be entirely different. It is no hardship to give a construction to this pure food and drugs act which will make it effective and accomplish the purpose intended so long as it is not made oppressive. In all cases of the transportation of frozen eggs so far decayed as to render them unfit for human food the owner may denature them before shipping or perhaps label them; but in any event, so long as the statute stands as it does, the transportation in interstate commerce of frozen eggs, or eggs not frozen but so far decayed or decomposed that it may be said they consist "in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance," is prohibited, as eggs, whether the contents of the shell be therein, or removed and in cans or other receptacles and frozen or unfrozen, are an article generally and almost universally used and dealt in as and for food and are adulterated when they consist of a "decomposed animal or vegetable substance." Eggs are either an animal or a vegetable substance. Clearly they are not a mineral substance. The title of this Food and Drugs Act declares it to be: "An act to prevent the manufacture, sale or transportation of adulterated, or misbranded, or poisonous, or deleterious foods, drugs, medicines and liquors, and for regulating traffic therein, and for other purposes." Would it be an answer to the seizure and attempted condemnation of a carload of partly decomposed beef being transported from Chicago to New York, for the owner to say "I did not intend it to be used or sold in New York for food, but as soap grease or a fertilizer"; such purpose not having been in any manner disclosed? *Philadelphia Pickling Co. v. United States* (C. C. A. 3rd Circuit), 202 Fed. 150, 120 C. C. A. 429, while not on "all fours" with this case in all its facts, is, it seems to me, on "all fours" in principle, unless it can be said that inasmuch as partially decayed eggs, a decomposed article of food, having become unfit for food, are no longer an adulterated article of food, but an article for use in tanning leather, and hence not within the act at all as they may be and sometimes are used for that purpose. This contention cannot be sustained. If decomposed eggs were incapable of being used for food, as in making cakes and the like, the case would be different. The construction of this Pure Food and Drugs Act contended for by this claimant would open the door to the unrestrained transportation in interstate commerce of partially decomposed eggs, as the owner and dealer would, it might be honestly, transport them for sale in another State for use in tanning and actually, so far as he is concerned, sell them for that purpose or to some one claiming to purchase them for such purpose, when in fact the purchaser was intending to use them as an article of food, or to dispose of them to some one to mix with flour, etc., and use as an ingredient in an article of food, such as cake, etc.

In *Hipolite Egg Company v. United States*, 220 U. S. 45, 31 Sup. Ct. 364, 55 L. Ed. 364, the object of this Pure Food and Drug Act is declared to be:

to keep adulterated articles out of the channels of interstate commerce, or if they enter such commerce to condemn them while in transit, or in original or unbroken packages after reaching destination; and the provisions of section 10 of the act apply not only to articles for sale but also to articles to be used as raw material in the manufacture of some other product.

In that case the "other product" was an article of food as the eggs were to be used for baking purposes, but I do not see that such fact affects the force of the decisions as to the purpose of the act, which is to prevent the transportation in interstate commerce of adulterated articles which these eggs, within the definition of the law-making body, are conceded to have been.

Eggs released from the shell, and frozen or unfrozen, are an "article of food," and, if adulterated, their transportation in interstate commerce is prohibited, and the act says (sec. 7): "That for the purposes of this act an article shall be deemed to be adulterated * * * in the case of food: * * * Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not," etc. The fact that decomposed eggs ought not to be used for food or as an ingredient of some food article does not remove them from the category of adulterated article of food, they being within the statutory definition, nor does the fact that they may be used for tanning purposes. If the statute is to be construed so as to make it effective to prevent the interstate transportation of eggs, decomposed or partly decomposed, and hence unfit for human consumption, and thus carry out the intent and purpose of Congress, the eggs in question must be held to be within the operation of the act and subject to condemnation.

There will be an entry directing a verdict of condemnation and a judgment accordingly.

UNITED STATES v. FINLAYSON ET AL.

(District Court, S. D. New York, October 23, 1913.)

N. J. No. 2914.

An article labeled "Genuine Hollands Geneva Gin Deer's Head Brand Distilled by London Wine & Spirit Co. New York." held not misbranded as purporting to be a foreign product when not so.

Information alleging violation of the Food and Drugs Act. Jury trial. Verdict of not guilty.

This information alleged violation of the Food and Drugs Act by Alexander M. Finlayson, George H. Armstrong and Etta E. Parish, doing business under the firm name and style of London Wine & Spirit Co., New York, N. Y. The alleged offense consisted in the shipment from the State of New York into the State of Massachusetts of a quantity of gin which was alleged to be misbranded. The gin in question was labeled "Genuine Hollands Geneva Gin Deer's Head Brand Distilled by London Wine & Spirit Co. New

York. Deer's Head Brand is the finest type of pure and well matured gin." Misbranding of this product was alleged for the reason that it purported to be a foreign product, to wit: A product of Holland, when not so, but was a product of the United States; and further misbranded in that the statements, designs and devices on the label thereof were false and misleading and calculated to deceive and mislead the purchaser thereof in that said label indicated that the article was a product manufactured or produced in Holland, whereas, in truth and in fact, it was a product manufactured and produced in the United States; and further misbranded in that it was an imitation of genuine Hollands Geneva gin, and was offered for sale under the distinctive name of that article, whereas it was not genuine Hollands Geneva gin, but was a different article.

MAYER, *District Judge* (charge to the jury). This question before you is apparently an important one, and the case deserves and I have no doubt will receive at your hands very careful and deliberate attention, and I am about to endeavor to instruct you as to the law with considerable care, so that the real issues in the case may be entirely clear to you, and that in such discussion as you may indulge in in the secrecy of the jury room, you may not be led off into subject-matter unrelated to and irrelevant to the issue that you must determine.

At the outset you must dismiss from your minds any impression, if such should perhaps exist—and I feel quite confident that it does not—as to a controversy in this case between different classes of merchants.

This is not a case where these defendants are on trial for some encroachment on a label of another person in the same general line of business. If these defendants or any other persons, at any time, put out goods in some manner that another merchant feels is unfair to him, such question is to be decided in another tribunal, and at another time, and in a proper proceeding, because the case here is a criminal prosecution, specifically brought under a particular statute, whose language, so far as applicable here, will, I am sure, appear very clear and very simple to you.

You will not, I am sure, entertain any prejudice or impression, whatever your individual line of business may be, either for or against importers, or for or against domestic manufacturers, because that is not the question in this case. Nor is there any question here before you of trade competition. Every man living in this country, whether he is engaged in the importation of goods, or in the domestic handling of goods, is entitled to compete fairly with other men in the same line of business, and along lines sanctioned by the law.

The sole question that you have to determine is a question of fact which I shall state to you in a few moments, and that question of fact, so far as you are concerned, comes as I have said on several occasions throughout this trial, within a narrow scope.

In this class of cases, the proceeding being of a criminal nature, it is begun usually by what is known as an information, which, to all intents and purposes, has the effect of an indictment. There were more counts in this information than are before you now, but only the last or third count is for you to consider, and I say that so that if you should have occasion to look at the indictment you will not read or pay any attention to the first and second counts.

The third count is brief, and so far as it is relevant I will read it.

It charges that in this jurisdiction the defendants, who are Mr. Finlayson, Mr. Armstrong, and Etta E. Parish, doing business under the name and style of London Wine & Spirit Company, made an interstate shipment of a certain article of food in a bottle labeled as follows—and then follows the label that you have seen and with which you are familiar—

which said article shipped as aforesaid, was misbranded in that it purported to be a foreign product, to wit, a product of Holland, when it was not so, but was a product of the United States. And the said article was further misbranded, in that the statement, design, and device on the label thereof were false and misleading and calculated to deceive and mislead the purchaser thereof, in that said label would indicate that the said article was a product manufactured or produced in Holland, whereas, in truth and in fact, the said article was an article manufactured and produced in the United States, and that said article was further misbranded, in that it was an imitation of genuine Hollands Geneva Gin, and was offered for sale under the distinctive name of that article, whereas, in truth and in fact, the said article was not genuine Hollands Geneva Gin, but was a different article.

Now the statute under which this information is laid reads as follows, so far as here applicable:

That the term "misbranded," as used herein shall apply to all drugs or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

And then the statute goes on, that for the purposes of this act an article shall also be deemed to be misbranded if it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so.

When Congress passed this act it also passed in the act a provision allowing the Department of Agriculture to make rules and regulations, in accordance with the act, which when made should have the force of law, and so there is this regulation, which has the force of law, and which is applicable to this case, and upon which this case will practically turn.

The use of a geographical name in connection with a food or drug product will not be deemed a misbranding when by reason of long usage it has come to represent a generic term, and is used to indicate the style, type, or brand, but in all such cases, the State or Territory where any such article is manufactured or produced shall be stated upon the principal label.

The authorities recognize what many of us knew in one way or the other, that long usage has at times transformed a geographical name into a name that does not designate, necessarily, the place from which the article comes, but designates the style or type or brand of the article, and the further fact that this regulation was made by these experienced men in departmental work, doubtless—when I say "men" by "men" I mean, of course, always by the head of the department, but doubtless upon the advice and investigation of the subordinates under him—the very fact that such a regulation was made is in itself a recognition of the proposition that there are cases where the original meaning of the word has been added to, so that the word has a larger or more comprehensive meaning than it had originally.

"Generic" is a simple word, with which I think you are all familiar. It may be defined, I suppose, as meaning a class, as distinct from "specific," which might mean a particular member of a class, and when it is used in this regulation, which I have just read, in connection with the word "term," so as to create the phrase "a generic term," that word "generic" means a class. "A generic term" means the description of a class of product.

If I have made the simple words of this act clear, and the words of this regulation clear, then we may go on to consider what is the issue before you.

If, as a fact, you believe that the words "Holland" or "Hollands Gin" or "Hollands Geneva Gin" have acquired this generic meaning, so that they are no longer confined to a description of the place from which the gin comes, then the defendants are entitled to an acquittal at your hands, without any further consideration upon your part.

If you believe that those words include domestic gin of the Holland flavor and type, then the use of the word "Genuine" in this label does not add anything to the Government's position in the case. If that be your construction of the facts in the case, then "Genuine" may be construed as meaning a gin of the Holland taste or type, as distinctive from the other kinds of gin; to wit, the English gins, such as Tom, Dry, and Sloe Gin.

There is no definition of what "long usage" is. Those words are elastic, because you can readily see that there are certain kinds of products known in our commercial life which have been known for a considerable time; there are other kinds of products which have been known only a very short time, and the words "long usage" are a good deal like the word "reasonable;" they change with time and circumstances and the developments of a complex civilization. You are to determine. I am not going to define "long usage," because I can not do it. You are to determine upon the facts of this case whether the usage that has been testified to may fairly be said to be a "long usage."

The evidence in the case shows that so far as these defendants are concerned they have used this particular label for a matter of, I think, at least seventeen years, excepting, perhaps, the lower part, and that they have used for some fifteen years, so that their use of this term preceded the Food and Drugs Act.

You have also the testimony of other domestic manufacturers as to usage for a considerable number of years.

Have these gentlemen who put out domestic gin under this designation done so fairly and honestly, with no attempt at deception, and in such a manner as to create in the mind of the purchaser the idea that when he asks for a Holland gin he is asking for a gin of a flavor and a taste different from the other kinds of gin?

We are not at all concerned with what the importer thinks about it or what the domestic manufacturer thinks about it. We are concerned to determine whether, on all the evidence in this case, the purchaser, the ordinary, sane, fair-minded man, is purchasing an article that is intended to make him think it comes from Holland, or an article which has become widely known as an article not necessarily coming from Holland, but having a taste different from the other kinds of gin.

Pretty nearly everything but the crucial question in this case is not a matter of contradiction. The defendants do not deny that there was an interstate shipment, which brings the case into this court. They admit and concede, without equivocation, that Holland gin, or Hollands Geneva gin was originally the designation of gin made in Holland. They stand, as must the Government, upon the single proposition—the Government says that label means that it is intended to convince or lead any person who buys that article to believe that it was made in Holland, and the defendants say that that is not correct, that that label is intended, not to mislead the public but to inform the public that the contents of that bottle are gin of a certain flavor and type, and that that gin by long usage in this country has come to be known, because of its flavor and type, as a Holland gin.

That is the question in this case, and you have got to determine it on the evidence adduced. You have heard all of these witnesses. It seemed to me, although you will exercise your judgment and not take mine, that practically every man was conscientiously giving his point of view as he understood it. One set of men having their minds very much on the imported article, the other set of men being familiar with the course and practices of this particular branch of business in this country.

It is for you to determine, and that is one of the values of sending cases of this particular class to a jury of business men drawn from various kinds of work, because you are to determine the fact in this case, which is what I have said.

But there is another rule or set of rules which apply in this case. We have had in the case the atmosphere of a civil trial. That has been the court-room atmosphere, because counsel, notwithstanding their very natural occasional controversies, are gentlemen who tried the case in courteous fashion, and the whole conduct of the case has been such to make you forget, perhaps, and at times to make the Court forget, that the case is not a civil case but a criminal case, and while the penalty under this act for a first offense is not a severe penalty, yet the mere conviction is a matter of profound importance to any reputable merchant.

There is no controversy here as to the contents of this bottle being other than entirely proper. No suggestion in the information, and therefore there will be none in the evidence, that this is other than a perfectly proper domestic gin, which has been put in the bottle that contains this label, so it is not a case where you are to be diverted by any notion of a bad product being put up.

It is also entirely clear in this case that a different process is used for the manufacture or distillation of Holland gin from these other gins, and that that process has long been used in this country and is familiar to persons in the trade, and as presumably is the taste to the man who drinks gin.

So that we get back, and I am repeating myself purposely, to the sole question as to whether this Hollands gin has acquired this extra meaning, and if it has, that is the end of the Government's case, and whether it has, is for you to say.

But, as I started to conclude, this is none the less a criminal case, and every man under our system is presumed to be innocent until he is proven guilty beyond a reasonable doubt, and before the Govern-

ment may look for a conviction, or rather I would put it a little better, before a conviction may be had of any man informed against, or indicted, it is incumbent on the Government to prove his guilt beyond a reasonable doubt.

So that in this case your decision does not necessarily finally determine whether the defendants in some civil relationship may use this designation or not. If you entertain a reasonable doubt, such a doubt as a fair-minded man entertains in a consideration of the important affairs of his own life, then the defendants are none the less entitled to an acquittal at your hands.

Finally, I may say that in regard to the testimony in cases of this kind, it is quite usual to introduce the definitions from dictionaries, but those definitions have no greater force, and very frequently not as great a force, as the testimony that falls from human lips, where a witness is sworn and able to be examined and cross-examined. What you find in the dictionary is merely the conscientious definition, presumably conscientious, of learned men who have collated their information from various sources, and it has no more effect, and perhaps not as great, as the sworn words of human beings.

I think now that I have covered about all that is necessary to be said, and I hope that I have made the issue to be determined entirely clear, and I sincerely hope that you will confine your deliberations to that particular question that I have referred to under the rules that I have given you, and not be misled by anything that occurred in the case to indicate that this was, perchance, a controversy between merchants of various kinds.

The Government has made a certain request to charge. I feel that I have charged sufficiently fully, and I decline to grant the Government's request.

The request last referred to reads as follows:

That it is your duty to determine whether taking the label as a *whole* it is misleading to the average purchaser in that it creates in the mind of the purchaser the impression that he is getting a gin of the Holland type produced in Holland.

MR. PROSKAUER. I have one request, your honor. May I state it orally?

THE COURT. Yes.

MR. PROSKAUER. I ask your honor to charge the jury that the words "distilled by the London Wine & Spirit Co., New York" is a fair compliance with the second provision of the section, stating that where the word has a generic meaning the label shall also contain a statement of the State where it is distilled or made.

MR. AUCHINCLOSS. Your honor, it seems to me that is a question for the jury.

THE COURT. No, I think that is a question of law. I so charge.

MR. PROSKAUER. In other words, your honor charges the jury that that is a fair statement that the product is made in New York.

THE COURT. Yes; that leaves simply the single question for the jury to determine.

UNITED STATES v. LIBBY, McNEILL & LIBBY.

(District Court, E. D. Virginia, January 17, 1913, and Circuit Court of Appeals, Fourth Circuit, November 12, 1913.)

210 Fed. 148; N. J. No. 2938.

Condensed skimmed milk to which cane sugar had been added and the presence of the cane sugar not declared on the label, *held* adulterated and misbranded.

Information alleging violation of the Food and Drugs Act. Jury trial. Verdict of guilty.

WADDELL, *District Judge* (charge to the jury.¹ This is an information filed by the district attorney against Libby, McNeill & Libby, a corporation. The first count charges that, in violation of the act of Congress, known as the Food and Drugs Act, the defendant shipped in interstate commerce fifteen cases of an article of food, known as condensed milk, which it is alleged is adulterated within the meaning of the said act of Congress, in that a certain substance, to wit, cane sugar, had been substituted in part for said article.

The second count charges that the same shipment is misbranded within the meaning of the said act of Congress, because the labels on the packages containing the said article of food are alleged to be false and misleading, in that the statement "Condensed Skimmed Milk" borne thereon is false and misleading on the ground that the product is not wholly condensed skimmed milk, but is sweetened condensed milk, containing about 42.17 per cent of cane sugar.

The court charges you that if you believe from the evidence beyond a reasonable doubt that the defendant company on or about the 3rd day of May, 1912, at the city of Portsmouth, in this district, delivered to the Seaboard Air Line Railway, a corporation common carrier engaged in interstate commerce, fifteen cases of an article known as condensed skimmed milk for shipment to Savannah, Georgia, and that such a product was labeled and sold as a condensed skimmed milk, but that it contained 42.17 per cent of cane sugar, and that said sugar is not a component part of condensed skimmed milk, then you are further charged that the substitution of the cane sugar in part for the said product is in violation of section 7, paragraph two of said act of Congress, and therefore constitutes adulteration within the meaning of the said act.

You are further charged that if you believe from the evidence beyond a reasonable doubt that the said product was delivered as aforesaid, for shipment to another State, and that the label or brand on said product is false or misleading in any particular, then you are further charged that the product is misbranded within the meaning of the Food and Drugs Act, and you should find the defendant guilty.

You are further charged that it is not necessary for the Government to prove that the substitute substance, if you believe a substance has been substituted, in material part, for the milk, is deleterious or poisonous, or injurious to health; it is sufficient within the meaning of the law if any substance not a component part of the original sub-

¹ Not published in Federal Reporter. See N. J. 2938.

stance has been substituted. If such substance was substituted, then the article was adulterated, and you should so find.

In Error to the District Court of the United States for the Eastern District of Virginia. Affirmed.

[148]¹ Before PRITCHARD and WOODS, Circuit Judges, and ROSE, District Judge.

ROSE, *District Judge*, delivered the opinion of the court.

This is a prosecution under the Food and Drugs Act. It raises two questions as to the construction of that statute:

First. Are words in every-day use to be given when found on the labels of food products their ordinary and popular meaning rather than the commercial significance which they have acquired among manufacturers and dealers?

Second. Does the first proviso to section 8 of the act permit the use as a name for a compound or mixture intended for food of common words which will to an ordinary man appear to be descriptive but which, if so understood, will be false and misleading?

[149] The plaintiff in error was the defendant below. It will be so called here. It is a Maine corporation. Its factory is in Chicago. Among other things it there prepares what it calls the "Target Brand of Condensed Skimmed Milk." It does not put out this product under its own name, but under that of the "Foster Packing Company." That designation is not the name of an actual corporation, but is a mere trade-name under which the defendant, for some reason of its own, chooses to market some of its products. It is admitted that what it labels "Condensed Skimmed Milk" contains something more than two parts of cane sugar to something less than three parts of the more nearly solid constituents of skimmed milk. The information charged that the product was adulterated, because cane sugar had been in part substituted for skimmed milk and that it was misbranded, because the label was false and misleading, in that the contents of the can were not wholly condensed skimmed milk, but were to the extent of 42 per cent cane sugar.

The record shows that milk which has been reduced by evaporation to a fourth or less of its original weight is sometimes sweetened and sometimes is not. When it is sweetened, sugar is added to the skimmed milk while the latter is still in its natural state, in the proportion of three parts of sugar to twenty parts of milk. The mixture is then subjected to a process of condensation by evaporation, the effect of which is to reduce its weight by about 70 per cent. Of the 30 per cent remaining, upwards of two-fifths will be sugar. Unsweetened skimmed milk is condensed or evaporated in the same manner, except that, of course, no sugar is added to it. Unsweetened condensed or evaporated milk, whether skimmed or unskimmed, must be thoroughly sterilized before being hermetically sealed. After the seal is broken, it will not keep as long as the sweetened. In the latter the sugar acts as a preservative.

The defendant offers much evidence that manufacturers and wholesale and retail dealers of and in food products know that what passes under the name of "condensed milk" or "condensed skimmed milk" contains a large percentage of sugar. Many of them said that when

¹ Numbers in brackets refer to pages of Federal Reporter.

they ordered condensed skimmed milk they expect to get the sweetened article. If the unsweetened were sent them, they would feel that they had been imposed upon. From the testimony of some of these witnesses, however, it appeared that there were on the market many brands of sweetened condensed skimmed milk which were labeled "sweetened," and others which, containing no added sugar, were marked as "unsweetened."

The defendant asked the court to give eight instructions to the jury. Six of these, although in varying phraseology, were to the effect that, if condensed skimmed milk as commercially known is concentrated milk to which sugar has been added, the defendant must be acquitted. These instructions were refused.

There is no question that words should sometimes be given their trade or commercial meaning rather than their more ordinary one. Such has been long the rule of construction applied to tariff and revenue acts.

[150] Laws regulating the payment of duties are for practical application to commercial operations, and are to be understood in a commercial sense. Such laws are intended for practical use and application by men engaged in commerce, and hence it has become a settled rule in the interpretation of statutes of this description to construe the language adopted by the legislature and particularly in the denomination of articles according to the commercial understanding of the terms used. *Tyng v. Grinnell, Collector*, 92 U. S. 470, 23 L. Ed. 733.

On the other hand, when it is alleged that a particular description, branding, or method of offering of goods for sale will enable one dealer to pass off his products for those of another, it is usually immaterial whether dealers in such articles are deceived or not. The inquiry in such cases is whether the ultimate purchaser will be misled. *Hopkins on Trade-Marks*, sec. 106.

Pure food laws are intended to protect the public whose members may be, and in the more numerous part usually are, ignorant of the technical significance which ordinary words may have acquired in particular trades or industries.

The Supreme Court of Michigan has said that decisions construing revenue acts—

do not apply to cases arising under the pure food laws of State governments. Courts will take cognizance of the well-known fact that farmers, laboring men, and consumers are not generally familiar with the customs of trade and commerce in importing goods, or of the understandings of the trade between manufacturers and merchants who buy these products for retail trade. Such construction would emasculate the pure food laws, and deprive the people of the protection which the legislature wisely intended to give them. *Armour & Co. v. Dairy & Food Commissioner*, 159 Mich. 10, 123 N. W. 580, 25 L. R. A. (N. S.) 616.

We fully concur in this statement of the true rule of construction to be applied to pure food statutes, whether State or Federal. It follows that the learned judge rightfully refused to instruct the jury otherwise.

The other two requests of the defendant for instructions were that the jury should be told in effect that, if they should find that condensed skimmed milk as manufactured and sold to the public is a mixture or compound sold under its own distinctive name, the defendant was not required to indicate on the label of the product the presence of sugar in it. These requests were also denied.

It is not necessary in this case to attempt an exhaustive construction of the first proviso of section 8 of the act. In our view it has no application to the facts of this case. The words on the label were all in ordinary use. Each and every one of them could and would be understood by the general public to have been intended to convey their accustomed meaning; that is to say, the average man who read the label would suppose that the can contained skimmed milk which had been reduced in bulk by evaporating or otherwise driving off a part of its fluids.

Defendant does not question that unsweetened milk may be and habitually is subjected to this process and that a marketable product is thereby obtained. The description on its label would be strictly accurate if applied to such milk product, provided that the words [151] used are to be given their customary significance. Under such circumstances, the defendant may not use them to indicate the presence in substantial quantities of a constituent, the existence of which in the product they in their ordinary meaning impliedly deny.

The construction which is here put upon the statute works no hardship upon the defendant or upon other manufacturers and dealers in like case with it. It does not claim that its trade will be hurt by telling the purchasers of its goods that there is sugar in them. Its whole contention here rests upon the assumption that they already know that there is. If that be true, no harm will be done by stating the fact in plain language upon the label.

The defendant assigns error in the instructions actually given by the court below. They, however, do not appear to be open to criticism. They left to the jury to find, in addition to the other essential facts, whether sugar was a component part of condensed skimmed milk.

Affirmed.

UNITED STATES v. FIVE CASES OF HURDLE BRAND HOLLAND GIN.

(Supreme Court of the District of Columbia, December 1, 1913.)

N. J. No. 3397; 41 Washington Law Reporter, 783.

An article manufactured in the United States, labeled "Hurdle Brand Holland Gin distilled by Baird Daniels Co., Warehouse Point," held not misbranded as purporting to be a foreign product.

Libel for the condemnation of a quantity of gin on the ground that it was misbranded in that it purported to be a foreign product when not so. Hearing on libel and answer. Libel dismissed.

GOULD, *Judge*. The questions involved in this case are raised by a libel filed by the United States under the act of Congress of June 30, 1906, commonly known as the Food and Drugs Act, in which it is sought to condemn five cases, containing twelve bottles each of a liquid called gin, on the ground that the same are misbranded. The misbranding is charged to consist in labeling the liquid in such manner as to deceive a purchaser into the belief that it is a foreign product distilled in Holland, in the Kingdom of the Netherlands, whereas it was, in fact, distilled at Warehouse Point, in the State of Connecticut. The claimants are A. E. Beitzel, in whose possession

the gin was found, and the Baird Daniels Company, which distilled it. The label, a facsimile of which contains the alleged misbranding, appears in the libel.

Section 8 of the Food and Drugs Act provides as follows:

SEC. 8. That the term "misbranded" as used herein shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

* * * * *

In the case of food:

First. If it be an imitation of or offered for sale under the distinctive name of another article.

Second. If it be labeled or branded so as to deceive or mislead the purchaser or purport to be a foreign product when not so.

* * * * *

Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular.

On January 31, 1908, the department promulgated what is designated as regulation 19, which deals with the questions raised by the instant case. It reads as follows:

(b) The use of a geographical name shall not be permitted in connection with a food or drug product not manufactured or produced in that place when such name indicates that the article was manufactured or produced in that place.

(c) The use of a geographical name in connection with a food or drug product will not be deemed a misbranding when by reason of long usage it has come to represent a generic term and is used to indicate a style, type, or brand; but in all such cases the State or Territory where any such article is manufactured or produced shall be stated upon the principal label.

(d) A foreign name which is recognized as distinctive of a product of a foreign country shall not be used upon an article of domestic origin except as an indication of the type or style of quality or manufacture, and then only when so qualified that it can not be offered for sale under the name of a foreign article.

Two questions are thus presented for decision:

1st. Has the word "Holland," by reason of long usage, come to represent a generic term as applied to gin?

2d. Does the label fairly state the State or Territory where the article in question is manufactured?

If the word "Holland," a geographical name, when used in connection with gin has acquired a generic meaning as indicating a particular style, type, or brand of gin, and if the place of manufacture is fairly stated upon the label, the claimant, the Baird Daniels Company, would appear to have complied with the law. Probably the larger question, suggested by the terms of the statute itself, is also involved, viz, whether the label is such as to deceive or mislead a purchaser or purports to be upon a foreign product when not so. For, as Attorney General Wickersham once said, one of the main purposes of the Pure Food Law is to prevent deception being practiced on the public.

1st. The testimony for both the libelant and claimant leaves no room for doubt that Holland gin is essentially a distinct type or kind of gin, differing from either a dry gin or a sloe gin. The experts, having practical knowledge of the methods used in producing

each kind, state that the Holland gin is an alcoholic beverage made from small grains, specifically rye, barley, and barley malt, and that, in the distilling, the essential oils of the grain are retained and the fusel oils eliminated, thus giving the liquor its peculiar flavor and rendering it a "Holland" gin, with or without the addition of juniper berries. In a dry gin, on the other hand, the essential oils are entirely eliminated and the pure neutral spirit is distilled from a variety of flavoring materials, one of which is usually juniper berries. The evidence clearly establishes the distinct characters and qualities of the two kinds of gin, the first known as Holland gin and the second as English or dry gin.

It may be observed, although not especially significant, that while Holland gin received its name from the fact that it was distilled in Holland, the evidence shows that the elements are not grown or produced in Holland. The grain is obtained by Holland distillers from Russia, Austria, and the United States, and the juniper berries from Italy or Germany.

The evidence also establishes the fact that gin, having the genuine characteristics of Holland gin, has been manufactured in this country for at least eighteen years.

The standard dictionaries and encyclopedias, to which it is permitted to resort as authoritative sources for information in such cases (*United States v. Corno Feed*, 188 Fed. 453), make clear the distinctive character of Holland gin. The *Century Dictionary and Cyclopedia*, vol. 3, p. 2516, under the word "gin," says:

Gin. Abbreviation of Geneva, or rather of the older form genever * * * see geneva juniper. An aromatic spirit prepared from rye or other grain and flavored with juniper berries. The two important varieties of gin are Dutch gin, also called Holland and Schiedam, and English gin, known often by the name "Old Tom." Holland gin is almost free from sweetness and is generally purer than English.

In the eleventh edition of the *Encyclopedia Britannica*, vol. 12, p. 26, after defining the word "gin" as "an aromatized or compounded potable spirit, the characteristic flavor of which is derived from the juniper berry," and stating that the word is an abbreviation of geneva, both being primarily derived from the French *genievre* (juniper), says:

There are two distinct types of gin, namely, the Dutch geneva or Holland and British gin. Each of these types exists in the shape of numerous subvarieties. Broadly speaking, British gin is prepared with a highly rectified spirit, whereas in the manufacture of Dutch gin a preliminary rectification is not an integral part of the process. The old-fashioned Hollands is prepared much after the following fashion: The mash, consisting of about one-third of malted barley or bere and two-thirds rye meal, is prepared and infused at somewhat high temperature. After cooling the whole is set to ferment with a small quantity of yeast. After two or three days the attenuation is complete, and the wash so obtained is distilled, and the resulting distillate (the low wines) is redistilled, with the addition of the flavoring matter (juniper berries, etc.) and a little salt. Originally the juniper berries were ground with the malt, but this practice no longer obtains, but some distillers, it is believed, still mix the juniper berries with the wort and subject the whole to fermentation. When the redistillation over juniper is repeated the product is termed double (geneva, etc.).

The testimony on behalf of the libelant fully recognized the distinctive character of Holland gin.

It is considered, therefore, that the term "Holland" in connection with the word gin is a geographical name which has become generic by reason of language, and represents a style, type, or brand.

2d. The second question above suggested is answered by the label itself. In letters sufficiently large and plain to repel any suggestion that they are deceptive in fact or in intent it is stated:

"Distilled by Baird Daniels Co., Warehouse Point, Conn."

The conclusion, therefore, is that the claimant has complied with the statute and regulations in respect to branding its product.

It was contended on behalf of the libelant that, admitting that "Holland" as applied to a gin has come to be a generic term, and admitting further that the label fairly states the place where the article is manufactured, yet the claimant should qualify his label by adding the word "Domestic" type, style, or process, in juxtaposition to the words "Holland Gin." Two answers to this contention suggest themselves: First. If "Holland" has become generic, and if the gin distilled by the claimant contains exactly the same ingredients and is made by the same process, and is, in essence, the same identical thing as gin distilled in Holland, then it is "Holland" gin and not Holland "type," "style," or "process." In other words, it is entitled to be called what it is. Second. On the broader question as to whether the label as used is liable to deceive a purchaser into believing he is buying an imported article, it is rather difficult to understand how a customer who would fail to observe the words "Distilled by Baird Daniels Co., Warehouse Point, Conn." plainly printed on the label, would be more liable to notice the word "style," or "type," or other similar word, used in connection with the words "Holland gin."

There is also a charge of misbranding in the marking of the wooden crates or cases in which the bottles were transported, the words "Warehouse Point, Conn." being omitted. This is stated by the claimant to be an oversight, which will be remedied. The consumer, however, does not see the crates and is not, therefore, liable to be deceived by words or the omission of words thereon.

On the whole case the order will be that the libel be dismissed. The findings of fact will be made in accordance with this opinion.

UNITED STATES v. THE ANTIKAMNIA CHEMICAL COMPANY.

(United States Supreme Court, January 5, 1914)

231 U. S. 654; Circular No. 76, Office of the Solicitor.

A drug containing acetphenetidin, a derivative of acetanilid, *held* misbranded because it failed to bear a statement on the package or label to the effect that the acetphenetidin contained therein was a derivative of acetanilid; and because of the statement on the package that said drug contained no acetanilid.

In Error to and Appeal from the Court of Appeals of the District of Columbia. *Reversed*.¹

The facts are stated in the opinion.

¹ Reversing *United States v. 100 Packages of Antikamnia Tablets*, p. 416, *ante*.

[659]¹ Mr. Justice McKenna delivered the opinion of the court.

Libel for the seizure and condemnation of certain drugs under the provisions of the act of Congress of June 30, 1906, commonly known as the Food and Drugs Act, c. 3915, 34 Stat. 768.

The libel alleges that the drugs are in the possession and custody of The Wholesale Drug Exchange, a body corporate, at a numbered place in the city of Washington.

The drugs, it is alleged, are intended to be used for the cure and mitigation and prevention of diseases of man. They are described as follows:

[660] Twenty packages, more or less, of said drug, labeled and branded as follows: "Antikamnia Tablets, Contain 305 grains of acetphenetidin, U. S. P. per ounce. Guaranteed by the Antikamnia Chemical Company, under the Food and Drugs Act, June 30, 1906, U. S. Serial Number 10. The Antikamnia tablets in this original ounce package contain no acetanilid, antifebrin, antipyrin, morphine, opium, codein, heroin, cocaine, alpha or beta eucaine, arsenic, strychnine, chloroform, cannabis indica, or chloral hydrate, Antikamnia tablets five grains. One ounce Antikamnia Tablets. Manufactured in the United States of America by the Antikamnia Chemical Co., St. Louis, U. S. A."

Also seventy other packages, more or less, of said drug, labeled and branded as follows: "Antikamnia and Codein Tablets. Contain 296 grains acetphenetidin, U. S. P. per ounce. Contains 18 grains sulp. codein per ounce. Guaranteed by the Antikamnia Chemical Company, under the Food and Drugs Act, June 30, 1906. U. S. Serial Number 10. The Antikamnia and Codein tablets in this original ounce package contain no acetanilid, antifebrin, antipyrin, morphine, opium, heroin, cocaine, alpha or beta eucaine, arsenic, strychnine, chloroform, cannabis indica, or chloral hydrate. One ounce Antikamnia and Codein Tablets. Manufactured in the United States of America by the Antikamnia Chemical Co., St. Louis, U. S. A."

Also ten other packages, more or less, of said drug, labeled and branded as follows: "Antikamnia and Quinine Tablets. Contain 165 grains acetphenetidin, U. S. P. per ounce. Guaranteed by the Antikamnia Chemical Company under the Food and Drugs Act, June 30, 1906, U. S. Serial Number 10. The Antikamnia and Quinine Tablets in this original ounce package contain no acetanilid, antifebrin, antipyrin, morphine, opium, codein, heroin, cocaine, alpha or beta eucaine, arsenic, strychnine, [661] chloroform, cannabis indica, or chloral hydrate. One ounce Antikamnia and Quinine Tablets. Manufactured in the United States of America by the Antikamnia Chemical Co., St. Louis, U. S. A."

The ground of confiscation and condemnation alleged is that all of the packages of the drugs contain a large quantity and proportion of acetphenetidin, which, it is alleged, is a derivative of acetanilid, and that under the provisions of the act of Congress and of the regulations lawfully made thereunder it is provided and required that the label on each of the packages shall bear a statement that the acetphenetidin contained therein is a derivative of acetanilid; and yet, it is alleged that each and all of the packages fail to comply with such provisions.

It is also alleged that the packages are further misbranded, in that the labels thereon are false and misleading, for the reason that each and all of them bear the statement that no acetanilid is contained therein, and that the statement imports and signifies that there is no quantity of any derivative of acetanilid contained in the drug.

A warrant of arrest was issued upon which the marshal duly made return that he had arrested twenty packages of Antikamnia tablets, ten packages of Antikamnia quinine tablets and sixty-three packages labeled "Antikamnia and Codein Tablets," and otherwise duly executed the warrant.

¹ Numbers in brackets refer to pages of U. S. Reports.

The Antikamnia Chemical Company, appellee and defendant in error, alleging itself to be the owner of the drugs, petitioned to be made a defendant in the libel. The petition was granted, and the company thereupon filed the exceptions to the libel. The exceptions negative in detail the charges of the libel and assert conformity in the labeling of the packages to the act of Congress of June 30, 1906, quoting its 8th section as follows: “* * * or if the package fail to bear a statement on the label of the quantity or proportion of [662] any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilid, or any derivative or preparation of any such substances contained therein.” And it is averred that the act does not provide that there should be added to any derivative of any of the substances contained therein the name of the parent substance, and the act cannot be added to or enlarged by requiring the company to add to the name of a known article, the fact that the article is a derivative of any of the substances mentioned in the act. It is averred, therefore, that the packages are not misbranded and that the statement on the labels that no acetanilid is contained therein is in no way false or misleading because the libel does not allege that there is acetanilid in the packages, and, therefore, the statement instead of being false and misleading is, according to the allegations of the libel, true.

The exceptions were sustained and the libel dismissed.

It was stipulated that Food Inspection Decision No. 112, issued January 27, 1910, by the United States Department of Agriculture was considered by the court upon the hearing of the cause and should be included in and be considered part of the record on appeal.

The decision quotes section 8 of the act, states that the Attorney General, in an opinion rendered January 15, 1909, held that a derivative is a substance so related to one of the specified substances “that it would be rightly regarded by recognized authorities in chemistry as obtained from the latter ‘by actual or theoretical substitution,’ and it is not indispensable that it should be actually produced therefrom as a matter of fact;” further that the labeling of derivatives, as prescribed by section 8, is a proper subject conferred upon the department by section 3, and that a rule or regulation requiring the name of the specified substance to follow that of the derivative would be in harmony with the general purpose of the act, and an [663] appropriate method by which to give effect to its provisions.

In conformity to this opinion, Regulation 28 of the Rules and Regulations for the enforcement of the Food and Drugs Act was amended as follows:

* * * Acetanilide (antifebrine, phenylacetamide) Derivatives—Acetphenetidine, * * * (g) In declaring the quantity or proportion of any of the specified substances the names by which they are designated in the act shall be used, and in declaring the quantity or proportion of the derivatives of any of the specified substances, in addition to the trade names of the derivative, the name of the specified substance shall also be stated, so as to indicate clearly that the product is a derivative of the particular specified substance.

The decree of the Supreme Court of the District dismissing the libel was affirmed by the Court of Appeals.

The case is not in very broad compass, though the arguments of counsel are somewhat elaborate. The libel is prosecuted for the condemnation of one hundred packages of Antikamnia tablets as being

misbranded in violation of the Food and Drugs Act of June 30, 1906, c. 3915, 34 Stat. 768. The tablets contain acetphenetidin and the labels so state, and the proportion of the substance. It is a derivative of acetanilid, but the labels do not so state but do state that the tablets contain no acetanilid. And these omissions, it is contended by the Government, constitute a violation of the statute and of Regulation No. 28 as amended. The chemical company contends that the first statement is not required by the law and that the second statement is true, and therefore can not be false or misleading.

Preceding the discussion of these contentions a question of jurisdiction is presented by the chemical company and a motion to dismiss is made on the ground that only the construction of the statute is involved in the decision of [664] the court below. The company also moves for an affirmance of the judgment on the ground that the appeal is frivolous. *Contra* the Government contends that the Court of Appeals held invalid the regulation requiring the name of the primary substance as well as that of the derivative to be stated on the label; and that there is not only drawn in question, but so far denied, an authority exercised under the United States. We concur in this view. The validity of the regulation was and is denied. Its validity may, indeed, rest on the statute, but so did the validity of the rule of the Patent Office passed on in *Steinmetz v. Allen*, 192 U. S. 543. We there said (p. 556) of a rule of practice established by the Commissioner of Patents under a section of the Revised Statutes, "It thereby became a rule of procedure and constituted, in part, the powers of the primary examiner and Commissioner. In other words, it became an authority of those officers, and, necessarily, an authority 'under the United States.' Its validity was and is assailed by the plaintiff in error. We think, therefore, we have jurisdiction, and the motion to dismiss is denied." *United States ex rel. Taylor v. Taft*, Secretary of War, 203 U. S. 461, is not in antagonism to this ruling. In that case the relator was dismissed from the public service by an order of the Secretary of War as representative of the President. She sought restoration by mandamus. It was denied and she brought the case to this court on the ground that the validity of an authority exercised under the United States was drawn in question. Dismissing the case, this court said that as she did not question the authority of the President or his representative to dismiss her but contended only that certain rules and regulations of the civil service had not been observed, the validity of an authority exercised under the United States was not drawn in question but only the construction and application of regulation of the exercise of such authority. On p. 465 it was said [665] *Steinmetz v. Allen* was not to be contrary, "for there the validity of a rule constituting the authority of certain officers in the Patent Office was drawn in question."

Motion to dismiss is denied.

Joined with the motion to dismiss, we have seen, was a motion to affirm on the ground that the question of the authority of the Secretaries to make the regulation is frivolous in view of the decisions in *United States v. Grimaud*, 220 U. S. 506; *Williamson v. United States*, 207 U. S. 425 and other cases. How far this contention is tenable will be developed as we proceed with the consideration of the act and the power of the Secretaries under it.

The purpose of the act is to secure the purity of food and drugs and to inform purchasers of what they are buying. Its provisions are directed to that purpose and must be construed to effect it.

Section 3 gives the Secretary of the Treasury, the Secretary of Agriculture and the Secretary of Commerce and Labor, power to "make uniform rules and regulations for carrying out the provisions" of the act and the power to collect specimens of foods and drugs offered in interstate and foreign commerce. It adopts the definitions of the United States Pharmacopœia or National Formulary and provides (section 8) that the term "misbranded" as used in the act "shall apply to all drugs * * * the package or label of which shall bear any statement, design or device regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular." And, further, in case of drugs, an article shall be deemed to be misbranded "if the package fail to bear a statement on the label of the quantity or proportion" of certain enumerated substances "or acetanilid, or any derivative or preparation of any such substances contained therein."

These are the applicatory provisions. How are they to be construed?

[666] First, as to the power of the Secretaries. It is undoubtedly one of regulation only—an administrative power only—not a power to alter or add to the act. The extent of the power, however, must be determined by the purpose of the act and the difficulties its execution might encounter. The fact that a council of three Secretaries of governmental departments was given power to make the rules and regulations for the execution of the law shows how complex the matters dealt with were considered to be, and the care that was necessary to be taken to guard against their defeat or perversion. The composition of drugs is a matter of technical skill, their denomination often by words of scholastic origin, conveying no meaning to the uninformed, their uses and abuses learned only by experience, beneficial or evil. It was this experience that the law sought to avail itself of and to avail itself against the ever increasing powers of the laboratory or the disguises of a technical nomenclature. Hence the provision of the law that the term "drug" as used in the act shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, and hence also the provision that a drug or food product is misbranded in case it fails to bear a statement on the label of the quantity or proportion of certain enumerated substances, including acetanilid, "or any derivative or preparation of any such substance contained therein." Experience had demonstrated the quality of those substances, their effects had become common knowledge; their names, therefore, were all the warning it was necessary for the law to give. But derivatives of them might, probably would, be of their quality, so derivatives of them were to be guarded against, and the law hence further provided that the labels on them should state the "quantity or proportion" of "any derivative or preparation" of them. This much is clear—there is no obscurity in the words and purpose of the law. The [667] query then occurs, such being the words and purpose, if the quantity or proportion of the substances or any derivative or preparation of them must be stated, is it administrative of the law or additive to it to require by regulation that not only the name of the de-

rivative or preparation be stated but from what substance derived or of what it is a preparation? It certainly cannot be said that the purpose of the law is not exactly fulfilled by the regulation. If it fulfills the purpose of the law it cannot be said to be an addition to the law, unless, indeed, it can be contended that the law provided a means for its defeat by the easy device of mysterious names. There is illustration in the present case. What information does the use of the word "acetphenetidin" convey to anybody of its good or evil origin? If it be said that the like question may be asked of any of the primary substances, we reply that they are the precautions of the law and adopted as such because they had demonstrated themselves, the value of their use, the detriment of their abuse, and it was believed that their names would carry no deception.

But let us turn from the power of the Secretaries to the law itself and inquire if it needs the assistance of a regulation. It is the contention of the Government that it does not, that its requirement that the primary substances should be labeled and that their derivatives should be labeled means, necessarily, that it should be stated of what they are the derivatives to make the warning of the labels complete. A great deal of what we have said in discussing the power of the Secretaries applies to this contention and supports it. The purpose of the law is the ever insistent consideration in its interpretation. The purpose is to prevent the surreptitious sale of certain noxious drugs or their derivatives, the latter supposedly partaking of the quality of parent article and as effective of evil consequences. This being the purpose, did the law leave it unexecuted? We cannot attribute to it such defect, and a serious defect it might be. Nor can we consider as a case of omission that which involves so definitely the mischief which was intended to be redressed and which is fairly within the language of the law. And we say this without regard to the various illustrations contained in the Government's brief of the deceptions which can be practiced by using the name of the derivative alone, for the chemical company insists that we may not, in the absence of allegations and proof, look for knowledge in the encyclopedias, or medical lexicons or to trade practices for trade disguises, actual or possible. It is not necessary to enter upon the challenged ground. The law furnishes its own tests of what the labels should reveal, and we may grant, for the argument's sake, as contended, that it has penal character; but this does not mean that it should not be given its reasonable intendment. There is no hardship in this either to the manufacturer or the seller of drugs. They surely know what they make or vend—know whether it is primary or of what a derivative—and the law requires only that they put their knowledge on the labels for the information of purchasers. No serious burden is thereby imposed on honest business. Indeed, it makes the label on the packages an assurance as well as a warning and benefits all concerned, manufacturer, seller and purchaser. And this in the interest of the public health.

Decree reversed and cause remanded with direction to reverse the decree of the Supreme Court and remand the cause with direction to overrule the exceptions to the libel.



UNITED STATES v. 150 CASES OF FRUIT PUDDINE.

(District Court, D. Massachusetts, January 17, 1914.)

211 Fed. 360; N. J. No. 3329.

An article sold under its own distinctive name, to wit, "Fruit Puddine," held misbranded because of the false or misleading statement, "Fruit Flavored," borne on the label of said article.

Libel alleging misbranding of certain cases of an article of food labeled "Fruit Puddine." Jury waived, Decree for libellant.

[361]¹ MORTON, *District Judge*. This is a proceeding under the Food and Drugs Act, by information (or libel) against 150 cases of a food product called "Puddine" or "Fruit Puddine." A jury having been waived by both parties, the case was tried before me upon fact and law. I find the material facts, in addition to those alleged in the information and admitted in the answer, to be as follows:

"Puddine" or "Fruit Puddine" is the distinctive name, adopted and used as early as 1889, of a proprietary food product consisting largely of cornstarch. It is manufactured by the claimant and is put up in packages or cartons of different flavors, adapted to the retail trade. It does not contain any deleterious or poisonous ingredient. It is not an imitation of, or offered for sale under the distinctive name of, any other article; and the name "Puddine" or "Fruit Puddine" is accompanied on the same label or carton with a true statement of the place where it has been manufactured.

The alleged misbrandings lies in the words "Cream Vanilla," "Rose Vanilla," and "Fruit Flavored," which appear upon the cartons. "Cream Vanilla" and "Rose Vanilla" are two of the many flavors in which Puddine is manufactured. All the cartons in question appear to have been marked "Fruit Flavored Puddine," to which is added on some cartons "Cream Vanilla," and on others "Rose Vanilla," according to the flavor of the Puddine therein.

[362] The plaintiff contends that branding any article of food with the word "Vanilla," alone or in combination with other words, is a representation that it is flavored with vegetable extract of vanilla made from the vanilla bean; that the word "Cream" prefixed to the word "Vanilla" means the best or highest grade of vanilla; that the words "Cream Vanilla" on the claimant's cartons mean "flavored with the highest grade of vegetable extract of vanilla;" that the word "Rose" prefixed to the word "Vanilla" means a combination of the vegetable flavors of rose and vanilla; that the words "Rose Vanilla" on the claimant's cartons mean "flavored with the vegetable extracts of rose and of vanilla;" and that the words "Fruit Flavored" mean flavored with fruits (commonly so called), capable of being used as flavoring substances.

The contention of the claimants, who are the manufacturers of the product, is that "Puddine" and "Fruit Puddine" are artificial words, adopted as the name of their product, and constitute a distinctive name for the article within section 8, subsection 4 (1), of the act in question; that "Cream Vanilla" and "Rose Vanilla" are

¹ Numbers in brackets refer to pages of Federal Reporter.

also artificial words, adopted by them to indicate the taste and appearance of their product, and import nothing as to the origin of the taste; that they are not false or misleading; and that the term "Fruit" or "Fruit Flavored," while adopted as an arbitrary or artificial part of the name, is in fact true, because the grain out of which the product is manufactured is, botanically speaking, a fruit.

The words in question are to be construed in their ordinary or customary meaning so far as they have one. *United States v. 75 Boxes of Pepper* (D. C.), 198 Fed. 934; *United States v. 30 Cases of Grenadine* (D. C.), 199 Fed. 932; *Brina v. United States*, 105 C. C. A. 558, 179 Fed. 373.

The distinctive or trade name of the product is "Puddine," or "Fruit Puddine," always accompanied on the cartons by words indicating the flavor. "Puddine" and "Fruit Puddine" are frequently used without the adjective "Fruit Flavored," which is not part of the name. It seems clear that "Fruit Flavored" does signify, as the plaintiff contends, that the article is flavored with "fruit" in the common, not the botanical meaning of the word. As no such fruit is used in "Puddine," the words "Fruit Flavored" are untrue and misleading as applied to it; and the misleading effect of them is heightened by the picture of a dish of fruit which appears on some of the cartons. If Puddine were not an article of food known under its own distinctive name, it would clearly be "misbranded" within the act by reason of the words "Fruit Flavored" upon the cartons.

The claimant contends, however, that articles of food which come within the terms of the proviso to the fourth subsection of section 8 are exempt from the operation of the Food and Drugs Act, and are not to be deemed misbranded, no matter what misstatements are made upon the cartons. The plaintiff contends: (1) That the first paragraph of section 8 prohibits all misbranding as therein defined, and is not limited by the proviso in question; and (2) that, even if the proviso does apply, it is not the intent of it to except from the operation of the act anything except the distinctive name itself; that even if, as to articles [363] of food which come within the proviso, misstatements which form part of the name itself are not forbidden, it is nevertheless true that any other false or misleading statements regarding the ingredients or substances contained in such articles constitute misbranding.

It has been said that the sole purpose of this statute "was: (1) To protect purchasers from injurious deceits by the sale of inferior for superior articles, and (2) to protect the health of the people by preventing the sale of normally wholesome articles, to which have been added substances poisonous or detrimental to health." *Sanborn, J., Hall-Baker Co. v. United States*, 198 Fed. 614, 616, 117 C. C. A. 318 (C. C. A., 8th Circuit). In other words, deception and unwholesomeness are the evils which the act is designed to prevent. The last part of section 8, providing that "manufacturers of proprietary foods which contain no unwholesome added ingredients" shall not be required "to disclose their trade formulas, except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding," plainly implies that a proprietary product may be misbranded. The report of the committee (House of Representatives, 59th Congress, First Session, Report No. 2118, March 7, 1906) and the debates, so far as they refer to the proviso in ques-

tion, indicate that the attention of Congress was directed to protecting thereby established distinctive or trade names from being outlawed by the act.¹

In *United States v. 40 Barrels of Coca-Cola* (D. C.), 191 Fed. 431, 440, it was held that the proviso in question "was only intended to protect an article sold under its distinctive name from the charge of misbranding in so far as any statement or suggestion contained in the name itself [364] is concerned." See, too, *United States v. American Chiclé Co.*, U. S. Dist. Court, District of Oregon² (no opinion filed).

It is undoubtedly true that persons purchasing a proprietary article of food, like Puddine, get what they go for, whether all the statements on the carton are correct or not. But it is also true that the purchase of a proprietary article may well be induced by false statements concerning it upon the cartons; and it is not difficult to imagine cases in which reliance on such misstatements would work real injury to the purchaser. For example, if such an article were branded "Contains no sugar," when in fact it did, the misbranding might induce the purchase by persons whose diet demanded absence of sugar. Such articles are within the purview of the statute. It does not seem to me that the proviso in question was intended to except them absolutely from the provisions of the act and to leave the manufacturers free to make misrepresentations concerning them. Such a construction is out of harmony with all the rest of the statute and disregards one of the principal purposes of it. It seems to me that the protection afforded by the proviso is limited to the distinctive name; and, as so limited, I have no doubt that the proviso applies to the first paragraph of section 8 and fully protects distinctive names from being misbranding.

I therefore find and rule that the words "Fruit Flavored" upon the cartons containing Puddine were a statement regarding such article, or the ingredients or substances contained therein, which was false or misleading and constituted misbranding within the statute.

The conclusion above reached makes it unnecessary to consider whether the use of the words "Cream Vanilla" and "Rose Vanilla"

¹ The legislative history of this act is as follows: The bill which, after amendment, became the Food and Drugs Act of June 30, 1906, was Senate Bill No. 88, 59th Congress, First Session. It is printed in full in the Congressional Record for that session at page 897. It was reported favorably to the Senate December 14, 1905 (Senate Reports, vol. 1, No. 8, 59th Congress, First Session), passed by the Senate February 21, 1906 (Cong. Rec., 59th Congress, First Session, p. 2773), and was introduced in the House of Representatives the next day (page 2853), and there referred to the Committee on Interstate and Foreign Commerce. The Committee's report is found in House Reports, 59th Congress, First Session, vol. 1, Report No. 2118. The Committee of the House recommended amendment to the Senate Bill by substituting for it the Hepburn Pure Food Bill (H. R. 4527, reported to the House January 18, 1904, and passed by the House) as amended by the Committee. The bill was passed by the House, with amendments, June 23, 1906 (Rec., pp. 9076, 9353), and sent back to the Senate, which refused to concur. Conference Committees filed identical reports June 27, 1906, setting out in full the bill as agreed upon and recommending that it pass (House Reports, vol. 3, No. 5056; Senate Docs., vol. 8, Doc. 521; Cong. Rec., pp. 9353, 9379, 9381). The second conference report, making certain minor improvements in sections 1 and 2 of the bill, was filed June 29, 1906, giving the bill as finally enacted (House Reports, vol. 3, No. 5096). The bill was then passed and signed June 30, 1906.

As to the distinctive name proviso:

The subject matter of this proviso appeared in the original Senate bill, and the proviso as finally passed first appears in substance in the bill as amended by the House Committee, where it is numbered paragraph 4 of section 7. There appears to have been no discussion at all of the "Distinctive Name" proviso in the debates in the Senate, and the only allusion to it in the debates in the House is found under date of June 23, 1906 (Cong. Rec., 59th Congress, First Session, p. 9068).

² See N. J. No. 1939, p. 524, *ante*.

constitutes misbranding; but I infer from what was said at the argument that this is a point upon which a decision is particularly desired by the parties. I therefore proceed to find the facts and state my conclusions in reference thereto.

No such extract, flavoring matter, or combination as "Rose Vanilla" is known to the trade, or to the public, except in connection with the defendant's products; nor any such extract or flavoring matter as "Cream Vanilla," except perhaps to a limited extent in the bottling trade, in which it is sometimes used to signify a high-grade vanilla extract; but such use is not known to the public generally and is wholly unrelated to the use by the claimant. "Cream Vanilla," as applied to the claimant's product, is certainly not understood by the public as meaning "flavored with a high-grade vanilla extract." The word "Rose," followed by "Vanilla," was registered by the claimant in the United States Patent Office as a trade-mark applicable to "Puddine" on the 21st of May, 1889. Both "Rose Vanilla" and "Cream Vanilla" were in use by the claimant on Puddine before the Food and Drugs Act went into effect.

Puddine is not flavored with the vegetable extract of vanilla, but with vanillin, or synthetic vanilla, which is obtained from the oil of cloves. Natural vanillin is found in the vanilla bean and forms the characteristic and most important element in the vegetable extract of vanilla. It is what gives to vanilla extract its characteristic taste. Synthetic vanillin is one of the comparatively recent discoveries in organic chemistry, [365] of which indigo and madder are other examples. It is exactly the same as the natural vanillin. The flavor produced by synthetic vanillin is as wholesome as that produced by the vegetable extract of vanilla and is substantially identical with it in taste, the difference, if any, being due to accidental substances in the natural extract. As used by the claimant, "Cream Vanilla" is applied to cream-colored Puddine flavored with vanillin, and "Rose Vanilla" to exactly the same thing colored pink with a harmless dye, the difference being in color only.

When a proprietary product is sold in different flavors, I see no reason why there may not be a distinctive name of a particular flavor, nor any reason for denying to such a name the protection of the proviso. The very purpose of the proviso, as I construe it, was to save distinctive names, which might be of great value, and the use of which might otherwise have been forbidden. "The purpose of the law is the ever-insistent consideration in its interpretation." *McKenna, J., United States v. Antikamnia Chemical Co.* (January 5, 1914), 231 U. S. 654, 34 Sup. Ct. 222, 58 L. Ed. —. I find and rule that "Cream Vanilla" and "Rose Vanilla," as used with "Puddine," are artificial and distinctive names adopted by the claimant, the use of which is not misbranding. It is unnecessary to decide whether the word "Vanilla," applied to food, amounts, as the plaintiff contends, to a representation that the taste thereof has been produced by the vegetable extract and not by the synthetic product.

Decree for plaintiff.

HUYLER'S, A BODY CORPORATE, v. HOUSTON, SECRETARY OF AGRICULTURE.

(Court of Appeals, District of Columbia, February 2, 1914.)

N. J. No. 3343.

The Police Court of the District of Columbia is a "proper court of the United States" within the meaning of section 5 of the act, which requires United States attorneys to whom violations of the act are reported "to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States" for the enforcement of the penalties provided by the act.

In Equity. Appeal from a decree of the Supreme Court of the District of Columbia. Affirmed.

Mr Justice ROBB delivered the opinion of the court. This is an appeal from a decree of the Supreme Court of the District sustaining appellee's demurrer and dismissing appellant's bill for an injunction to restrain the appellee, the Secretary of Agriculture, from publishing (pursuant to section 4 of the so-called Food and Drugs Act of June 30, 1906, 34 Stat. 768) notice of a judgment in the Police Court of the District of Columbia imposing a fine of \$200 upon appellant after conviction of the offense of offering for sale and selling an adulterated article of food.

Section 4 of said act provides that a chemical examination of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of that bureau, for the purpose of determining whether such articles be adulterated or misbranded within the meaning of the act, and if the result of that examination shows adulteration or misbranding, it is made the duty of the Secretary to notify the party from whom the sample was obtained. Thereupon the party so notified is given an opportunity to be heard and if, after hearing, it appears that any of the provisions of the act have been violated by such party it is made the duty of the Secretary at once to

certify the facts to the *proper United States district attorney*, with a copy of the result of the analysis or examination of such article duly authenticated by the analyst or officer making such examination, under the oath of such officer. *After judgment of the court, notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid.*

Section 5 of the act makes it the duty of each district attorney to whom such a violation shall be reported by the secretary

or to whom any health, or food, or drug officer, or agent of any State, Territory or the District of Columbia shall present satisfactory evidence of such violation, to cause appropriate proceedings to be commenced and prosecuted in the *proper court of the United States* without delay for the enforcement of the penalties herein provided.

Appellant was duly convicted in the Police Court of the District of Columbia and fined \$200 for offering for sale and selling adulterated maple sugar. It is the contention of the appellant that the Police Court is not a "proper court of the United States" within the meaning of said section 5 of the Food and Drugs Act and hence that the judgment of that court is absolutely void. This contention is easily met. Section 43 of the Code confers upon the Police Court

original jurisdiction concurrently with the Supreme Court of the District except where otherwise therein provided, "of all crimes and offenses committed in the said District not capital or otherwise infamous and not punishable by imprisonment in the penitentiary, except libel, conspiracy, and violations of the post-office and pension laws of the United States." The charge upon which appellant was prosecuted, being a first offense where the punishment may not exceed a fine of \$200, was therefore within the jurisdiction of the Police Court. That the Police Court is a court of the United States, although not in the sense of the Constitution, has already been determined. *United States v. Mills*, 11 App., D. C., 500. The question here is not whether the Police Court is a court of the United States in the constitutional sense, but whether it is a "proper court of the United States," within the meaning of the Food and Drugs Act. All other petty offenses against the United States, except those expressly reserved from its jurisdiction, are triable in that court, and no reason is perceived why one accused of adulterating food in this District is entitled to treatment different than would be accorded him if accused of some other petty offense against the laws of the United States. When, therefore, Congress used the words "in the proper courts of the United States," we think it clear that it meant in the courts having jurisdiction of similar offenses. The Police Court was therefore a proper court within the meaning of this section.

Decree affirmed, with costs.

UNITED STATES v. 36 BOTTLES OF LONDON DRY GIN.

(Circuit Court of Appeals, Third Circuit, February 2, 1914.)

210 Fed. 271; N. J. No. 2820.

Where an article is alleged to be misbranded within the meaning of the Food and Drugs Act, June 30, 1906, it is error for the trial judge to submit to a jury the question of intent to violate the statute.

In Error to the District Court of the United States for the Eastern District of Pennsylvania. Reversed.¹

Before GRAY and BUFFINGTON, Circuit Judges, and YOUNG, District Judge.

YOUNG, *District Judge*, delivered the opinion of the Court.

This is a proceeding by the United States for the condemnation of certain bottles of gin alleged to be misbranded in violation of the Food and Drugs Act of June 30, 1906. The eighth section of that act provides that an article shall be deemed to be misbranded "If it be labeled or branded so as to deceive or mislead the purchaser or purport to be a foreign product when not so." The cause went to trial before a jury upon the libel and amended libel and answer thereto by Sir Robert Burnett and Company, the claimant. The libel alleges that the bottles were labeled and branded so as to purport to be a foreign product, whereas they were in fact a domestic product. The amended libel alleges that the bottles were labeled and

¹ Reversing *United States v. 36 Bottles of London Dry Gin*, p. 647, *ante*.

branded so as to deceive and mislead purchasers thereof and to purport to be a foreign product when not so.

The assignments of error raise the single question whether or not, in a proceeding under the Food and Drugs Act for the condemnation of misbranded articles, the intent of the claimant is a necessary ingredient in the determination of the case. The learned trial Judge admitted evidence, over the Government's objection, for the purpose of showing good faith in the branding and absence of an intention to deceive. The court also submitted the question of intent as follows:

The third question refers more particularly to the second charge of the Government. It is this: In using the label in suit, did the maker of the gin [272]¹ intend to deceive or mislead the purchaser by representing the gin to be a foreign product, when in truth it was not a foreign product.

Under the libel and amended libel, the sole question was whether the packages were so labeled and branded as to deceive and mislead the purchaser. This was not the question submitted to the jury, but the question submitted to the jury was, as we have seen: Did the maker of the gin intend to deceive or mislead the purchaser?

The court was in error in submitting the question of intention to the jury. The Food and Drugs Act nowhere requires proof of intention by the use of the words "knowingly," "wilfully," or such like words. The language of section 8—in the case of food—subsection 2, of the act is: "If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so." This language clearly means if the label deceives or misleads the purchaser; if the purport of the label be that it is a foreign product when it is not so. This the label, and the label alone, must determine. The intention of the user to deceive is of no consequence. The act strikes at deceiving the public by selling them one thing when they desire to purchase another. As has been frequently said by courts, the purchaser has the right to choose for himself what he will purchase, and when he has purchased, the right to receive that which he desires and not something else. It would be destructive of the act, nullify it entirely, to allow the intent of the maker to be considered as a defense. We believe the decided cases sustain the principle that the intent is not a necessary ingredient in the determination of the case.

In *McDermott v. Wisconsin*, 228 U. S. 115, on page 132, 33 Sup. Ct. 431, at page 435 (57 L. Ed. 754), it is said by Mr. Justice Day:

The label upon the unsold article is in the one case the evidence of the shipper that he has complied with the act of Congress, while in the other, by its misleading and false character, it furnishes the proof upon which the Federal authorities depend to reach and punish the shipper and to condemn the goods. If truly labeled within the meaning of the act, his goods are immune from seizure by federal authority; if the label is false or misleading within the terms of the law, the goods may be seized and condemned. In other words, the label is the means of vindication or the basis of punishment in determining the character of the interstate shipment dealt with by Congress.

It is the purchaser that is to be protected.

The purchaser has a right to determine for himself which he will buy, and which he will receive, and which he will eat. The vendor cannot determine that for the purchaser. He, of course, can make his arguments, but they should be fair and honest arguments. *United States v. 100 Cases of Tepee Apples* (D. C.) 179 Fed. 987.

¹ Numbers in brackets refer to pages of Federal Reporter.

In *United States v. Johnson*, 221 U. S. 488, at page 497, 31 Sup. Ct. 627, at page 628 (55 L. Ed. 823), Mr. Justice Holmes says:

In further confirmation, it should be noticed that although the indictment alleges a wilful fraud, the shipment is punished by the statute if the article is misbranded, and that the article may be misbranded without any conscious fraud at all.

In the *District of Columbia v. Lynham*, 16 App. D. C. 85, it is said:

It was no defense for a druggist prosecuted for selling an adulterated drug in violation of the Act of Congress February 17, 1898 (30 Statutes 246), relating [273] to the adulteration of food and drugs in the District of Columbia, to show simply that he was at the time of sale * * * ignorant of the fact that the drug was adulterated, as he must know what he sells, or proposes to sell, and that it conforms to the standard prescribed by law.

In *United States v. Five Boxes of Asafoetida* (D. C.) 181 Fed. 561, it is said by Judge Holland:

The article of food or drug adulterated or misbranded is declared to be forfeited as an offending thing which threatens the health of the citizen, and therefore subject to seizure, without regard to the acts or knowledge of the owners or claimants.

For these reasons, the judgment must be reversed, and a new trial granted.

UNITED STATES v. SEVEN CASES OF BUFFALO LITHIA WATER.

(Supreme Court, District of Columbia, February 16, 1914.)

Circular No. 78, Office of the Solicitor.

Water taken from a spring at Buffalo Lithia Springs, Mecklenburg County, Va., and labeled "Buffalo Lithia Water Springs No. 2 * * * Buffalo Lithia Springs Water, Nature's Materia Medica," with numerous statements on the label concerning the alleged efficacy of such water as a therapeutic agent, held misbranded because said water did not contain a sufficient amount of lithium to entitle it to be called lithia water.

Libel for the condemnation and forfeiture of seven cases, more or less, of so-called "Buffalo Lithia Water," for misbranding. On amended libel and answer. Jury waived. Judgment for the libellant.

GOULD, *Judge*. The original bill in this case was filed December 21, 1910. It sought to condemn seven cases of bottles containing water labeled as "Buffalo Lithia Water," on the ground that they were misbranded and thereby violated the act of June 30, 1906, the misbranding being alleged to consist of statements that the liquid was *æ* lithia water, whereas it did not contain an appreciable amount of lithium, and would not give the therapeutic effect of lithium when a reasonable quantity was consumed, and, further, that the water was not a lithia water, or entitled by reason of its ingredients to be so called. The libel also alleged, as a further misbranding, that the bottles were offered for sale under the distinctive name of lithia water, when in fact it was not lithia water, and that the bottles were labeled and branded so as to deceive and mislead the purchaser thereof.

A demurrer having been sustained to this libel on April 6, 1912, an amended libel was filed April 6, 1912, omitting the original allegation that the water did "not contain an appreciable amount of lithium, and will not give the therapeutic effect of lithium when a reasonable

quantity" is consumed. A demurrer to the amended libel was overruled June 13, 1912, whereupon the claimants, on December 12, 1912, filed their answer denying that the water was misbranded. Upon the issue thus joined, voluminous testimony has been taken in different parts of the country. The questions of fact involved have, by agreement, been submitted to the court sitting as a jury.

It is somewhat difficult to accurately describe the label as it is voluminous, but the most striking feature of it are the words "Buffalo Lithia Water Springs No. 2," in white letters, relatively large, on a blue field, surrounding the figure of a draped woman, in a sitting posture, holding an urn on her lap, and herself surrounded by the words in much smaller type "Buffalo Lithia Springs Water, Nature's *Materia Medica*." Beneath the foregoing, in a smaller but plain type, is the following: "This water is indicated in all affections due to the Uric Acid Diathesis—Gout or Rheumatism in all their forms, Stone in the Bladder, Kidneys, or Liver, Bright's Disease and Kidney Diseases of every form, Albuminuria of Pregnancy or Scarlet Fever, Uraemia and its accompanying troubles, Menstrual Irregularities, Acid Dyspepsia, Nervous Disorder in all its forms, Malarial Fevers, and in the preparation of Artificial Food for Infants. Dose: From six to eight glasses of the ordinary size per day is the average dose. Many persons, however, take a larger quantity." At the bottom of the label are the words "Buffalo Lithia Springs Water Co., Buffalo Springs, Virginia." At the top are the words "Guaranteed under the Food and Drugs Act, June 30, 1906."

It is admitted by the Government that the water in controversy is a natural spring water taken from a spring known as "Buffalo Lithia Springs" situated at Buffalo Lithia Springs, in Mecklenburg County, Virginia. It is also admitted that the claimants or their predecessors have been continuously shipping and selling this water from this spring since 1878 under the label or brand "Buffalo Lithia Water."

There is little dispute as to the essential facts of the case. Naturally, the first question which the controversy suggests is, What is a "lithia water." There appears to be no definition given by the Pure Food Act or by the United States Pharmacopœia as to the quantity of lithium which a given amount of water must contain in order to reasonably entitle it to be designated "lithia" water. The Government has offered the testimony of chemists, pharmacologists, physicians, and druggists to the effect that the common understanding is that a natural lithia water is one that contains enough lithium so that when a reasonable quantity is consumed a physiological or therapeutic effect would be obtained in consequence of the lithium content. This appears not only to be a fair and reasonably accurate definition, one which appeals to the common sense and understanding of a nonscientific person, but is supported by the overwhelming weight of the testimony in the case. Speaking generally, and as an individual of average intelligence and information, it would seem that if one were offered a water which the vendor told him was a "lithia" water, one would have the right to expect enough lithium in the water to justify its characterization as such, thus differentiating it from ordinary potable water; and this amount would reasonably be expected to have some effect upon the consumer of the water by reason of the presence of the lithium.

This is especially true, in view of the fact that lithium has been quite commonly believed to have a therapeutic effect on physical ailments which may be classified generally under the head of the uric-acid diathesis.

The second question which also arises quite naturally is as to the actual lithium content in a given quantity of the water in controversy. Several analyses were offered in evidence made by both the Government and by the claimants. As these differ so slightly in respect to the amount of lithium found in a given quantity of water, those made by the Government will be taken as accurate. In addition, the evidence is uncontradicted that the analyses made by the Government experts were made according to the most improved methods, and no attempt was made to impugn their accuracy or fairness.

Dr. Collins, an expert chemist employed in the Bureau of Chemistry, examined three samples of the water in controversy, two of which were part of the water seized. He gives in great detail every step taken by him in his analyses to determine the quantity of lithium. The result was that in two liters of the water (about two and one-fifth quarts) he found no weighable amount of lithium. That is, a chemical analysis showed absolutely no appreciable amount of lithium in the bottle of water of the size usually sold. By the use of the spectroscope, however, it was found that there was two-thousandths of a milligram in a litre; that is, about one ten-thousandth of a grain per gallon of water, or one grain in ten thousand gallons of water. To further illustrate the infinitesimal quantity of lithium in this water, it was testified that the average dose of lithium as a uric acid solvent was from five to seven and a half grains three times a day. So that, for a person to obtain a therapeutic dose of lithium by drinking Buffalo Lithia Water he would have to drink from one hundred and fifty thousand to two hundred and twenty-five thousand gallons of water per day. It was further testified, without contradiction, that Potomac River water contains five times as much lithium per gallon as the water in controversy.

It has already been stated that the claimants made no question as to the accuracy of the Government analysis; it might be added that their own latest analysis, by the Lederle Laboratories in New York City, showed only a spectroscopic trace of lithium in the water.

The Government also produced pharmacologists and physicians, eminent in their professions, who testified that the amount of lithium disclosed in this water, either singly, or in combination with the other elements contained in it, could not, by any possibility, have any physiological or therapeutic effect upon the consumer.

It is concluded, therefore, that a person drinking Buffalo Lithia Water for the hoped-for benefit he may derive from the lithium in it, is deceived and misled, because a potable quantity contains no appreciable lithium.

Moreover, this deception is increased and aggravated by the language on the label accompanying its designation as "Buffalo Lithia Water." Lithium is supposed to be a solvent for uric acid, to prevent the formation of calculi and to remove it from the system in rheumatism and gout. The label, immediately under the large letters "Buffalo Lithia Water," and in the center of the label, contains this language: "This water is indicated in all affections due to the Uric Acid Diathesis—Gout or Rheumatism in all their forms, Stone in the

Bladder, Kidneys or Liver, Albuminuria of Pregnancy or Scarlet Fever, Uraemia and its accompanying troubles, Menstrual irregularities, Acid Dyspepsia, Nervous Disorder in all its forms, Malarial Fevers, and in the preparation of Artificial Food for Infants." The word "indicated" as a medical term, as defined by Webster, means "to point as to the proper remedy." The Uric Acid Diathesis means the class of diseases due to the presence of an excess of Uric Acid. So that the purport and effect of the label to a purchaser is to tell him that this water, by reason of the lithium in it, is the proper remedy for those diseases which are due to uric acid, of which lithia is a solvent.

It becomes pertinent to notice the attitude of the courts towards labels of this character, irrespective of the Pure Food Act.

Where the manufacturer of a liquid laxative medicine to which he gave the name of "syrup of figs" and who had spent vast sums in advertising it, sought to enjoin another from using the name, it was held that he was not entitled to the injunction because he falsely represented to the public that the juice of the fig was the important medical agent in the composition of the medicine, when in fact only a suspicion of fig juice was put into it, and the real laxative was senna. This was so held notwithstanding there was much evidence showing that it was a very useful medicine and prescribed by physicians of high standing. In deciding the case Judge Taft said: "This is a fraud upon the public. It is true it may be a harmless humbug to palm off upon the public as syrup of figs what is syrup of senna, but it is nevertheless of such a character that a court of equity will not encourage it by extending any relief to the person who seeks to protect a business which has grown out of and is dependent upon such deceit." *California Fig Syrup Co. v. Frederick Stearns & Co.*, 73 Fed., 812.

This case was subsequently approved and followed by the Supreme Court in *Worden v. California Fig Syrup Co.*, 187 U. S., 519.

The same principle was applied in the cases of *Memphis Keeley Institute v. Leslie E. Keeley Co.* (C. C. A. Sixth Circuit), 155 Fed., 964, and *Bear Lithia Springs Co. v. Great Bear Spring Co.*, 71 N. J., Eq. 595.

If the courts assume this attitude toward falsely labeled articles under the general rules of law and equity, a fortiori should they assume it in applying a statute such as the Pure Food Act, which has for its objects "not only to protect the public from unwholesome food and drink, but to require that any article of food, drink or medicine sold *shall be correctly described by its label.*" *U. S. v. Morgan et al.*, 181 Fed., 587.

In the very able oral argument and elaborate brief of claimant's learned counsel, there are two main contentions:

1st. They deny that the label represents that the contents of said bottles is a "lithia water." They insist that the label distinctly states that the contents of the bottles is that "particular natural mineral water known both as Buffalo Lithia Water and Buffalo Lithia Springs Water, and was taken" from the Buffalo Lithia Springs No. 2, etc.

In other words, the argument seems to be that if Buffalo Lithia Springs are falsely named, being called "Lithia" Springs, when they do not flow water containing lithium, therefore the proprietors have the right to sell the product as being Buffalo Lithia Springs Water, thus perpetuating upon the public the misnomer connected with the

origin of the water. It is not apparent how the deceit practiced upon the public by the label is mitigated by carrying it back to the designation of the spring from which the water comes.

2nd. It is next contended that if the word "lithia," as used on the label, can be construed to represent that the contents of the bottles is "lithia water," such representation would not be false or misleading, within the purview of the Food and Drugs Act, because the contents of the bottles is a lithia water as the term is understood in the English language, viz, a natural spring water containing "some lithia" or "a trace of lithium."

Assuming that the term lithia water requires only "some" lithium in the water, it would seem that even that flexible term should not be attenuated to include a water which contained only one ten-thousandth of a grain in a gallon, and in which even a trace in two litres could only be ascertained by the use of the spectroscope. But the evidence in the case is overwhelming that the term lithia water, as ordinarily understood, means a water containing a sufficient amount of lithium to give a therapeutic effect when drank in reasonable quantities. It is true that the Food and Drugs Act does not prescribe the quantity of lithium that a water should contain to entitle it to the name "lithia water." But that this is not a fatal objection to the law has been frequently held. *Shawnee Milling Co. v. Temple*, 179 Fed., 517; *United States v. Sacks of Flour*, 180 Fed., 518.

And, even if a standard were fixed as to the quantity which would entitle a water to such designation, it is reasonable to suppose that it would require at least a weighable or appreciable amount in a potable quantity of water.

It is also argued that no natural water, designated as lithia water, contains sufficient lithium to give a therapeutic effect by drinking a reasonable quantity. The evidence is not quite clear on this question; but the most it would prove would be the misbranding of other so-called lithia waters.

It is therefore concluded that the statement "Buffalo Lithia Water," on the labels on the bottles seized, is false and misleading within the meaning of the first general paragraph of section 8 of the Food and Drugs Act, and judgment will be accordingly entered for the libellant.

UNITED STATES v. LEXINGTON MILL & ELEVATOR COMPANY.

(Supreme Court of the United States, February 24, 1914.)

232 U. S. 399; Circular No. 79, Office of the Solicitor, N. J. No. 3398.

Section 7 of the act, paragraph 5, which provides that an article of food shall be deemed to be adulterated "If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health," does not embrace in its condemnation articles of food containing a poisonous or deleterious ingredient in such small amount that it can not by any possibility injure the health of the consumer.

On writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit. Affirmed.¹

¹*Lexington Mill & Elevator Company v. United States*, p. 604, *ante*, affirmed.

Mr. Justice DAY delivered the opinion of the Court.

The petitioner, the United States of America, proceeding under section 10 of the Food and Drugs Act, 34 Stat., 768, by libel filed in the District Court of the United States for the Western District of Missouri, sought to seize and condemn 625 sacks of flour in the possession of one Terry, which had been shipped from Lexington, Nebr., to Castle, Mo., and which remained in original unbroken packages. The judgment of the District Court, upon verdict in favor of the Government, was reversed by the Circuit Court of Appeals for the Eighth Circuit (202 Fed., 615), and this writ of certiorari is to review the judgment of that court.

The amended libel charged that the flour had been treated by the "Alsop Process," so called, by which nitrogen peroxide gas, generated by electricity, was mixed with atmospheric air and the mixture then brought in contact with the flour, and that it was thereby adulterated under the fourth and fifth subdivisions of section 7 of the act, namely, (1) in that the flour had been mixed, colored, and stained in a manner whereby damage and inferiority was concealed and the flour given the appearance of a better grade of flour than it really was, and (2) in that the flour had been caused to contain added poisonous or other added deleterious ingredients, to wit, nitrites or nitrite reacting material, nitrogen peroxide, nitrous acid, nitric acid, and other poisonous and deleterious substances which might render the flour injurious to health. The libel also charged that the flour was adulterated under the first subdivision of section 7, and was misbranded; but the Government does not urge these features of the case here. The verdict was broad enough to cover the charge under the first subdivision of section 7, but in the view we take of the case as to the instruction of the court under subdivision 5 need not be noticed.

The Lexington Mill & Elevator Company, the respondent herein, appeared, claiming the flour, and answered the libel, admitting that the flour had been treated by the Alsop Process, but denying that it had been adulterated and attacking the constitutionality of the act.

A special verdict to the effect that the flour was adulterated was returned, and judgment of condemnation entered. The case was taken to the Circuit Court of Appeals upon writ of error. The respondent contended that, among other errors, the instructions of the trial court as to adulteration were erroneous and that the act was unconstitutional. The Circuit Court of Appeals held that the testimony was insufficient to show that by the bleaching process the flour was so colored as to conceal inferiority and was thereby adulterated within the provisions of subdivision 4. That court also held—and this holding gives rise to the principal controversy here—that the trial court erred in instructing the jury that the addition of a poisonous substance in any quantity would adulterate the article, for the reason that "the possibility of injury to health due to the added ingredient and in the quantity in which it is added, is plainly made an essential element of the prohibition." It did not pass upon the constitutionality of the act, in view of its rulings on the act's construction.

The case requires a construction of the Food and Drugs Act. Parts of the statute pertinent to this case are:

Sec. 7. That for the purposes of this act an article shall be deemed to be adulterated: * * *

In case of food:

First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

* * * * *

Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health.

* * * * *

Sec. 10. That any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act, and is being transported from one State, Territory, District, or insular possession to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, * * * shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. And if such article is condemned as being adulterated or misbranded, or of a poisonous or deleterious character, within the meaning of this act, the same shall be disposed of by destruction or sale, as the said court may direct.

Without reciting the testimony in detail it is enough to say that for the Government it tended to show that the added poisonous substances introduced into the flour by the Alsop Process, in the proportion of 1.8 parts per million, calculated as nitrogen, may be injurious to the health of those who use the flour in bread and other forms of food. On the other hand, the testimony for the respondent tended to show that the process does not add to the flour any poisonous or deleterious ingredients which can in any manner render it injurious to the health of a consumer. On these conflicting proofs the trial court was required to submit the case to the jury. That court, after stating the claims of the parties, the Government insisting that the flour was adulterated and should be condemned if it contained any added poisonous or other added deleterious ingredient of a kind or character which was capable of rendering such article injurious to health; the respondent contending that the flour should not be condemned unless the added substances were present in such quantity that the flour would be thereby rendered injurious to health, gave certain instructions to the jury. Part of the charge, excepted to by the respondent, reads:

The fact that poisonous substances are to be found in the bodies of human beings, in the air, in potable water, and in articles of food, such as ham, bacon, fruits, certain vegetables, and other articles, does not justify the adding of the same or other poisonous substances to articles of food, such as flour, because the statute condemns the adding of poisonous substances. Therefore the court charges you that the Government need not prove that this flour or food-stuffs made by the use of it would injure the health of any consumer. It is the character—not the quantity—of the added substance, if any, which is to determine this case.

On the other hand the respondent insisted that the law is, and requested the court to charge the jury:

That the burden is upon the prosecution to prove the truth of the charge in the libel, that by the treatment of the flour in question by the said Alsop Process it has been caused to contain added poisonous or other added deleterious ingredients, to wit, nitrites or nitrite reacting material, which may render said flour injurious to health.

And in this connection you are further instructed that it is incumbent upon the Government to prove that any such added poisonous or other added deleterious ingredients, if any contained in said flour, are of such a character and contained in the flour seized in such quantities, conditions, and amounts as may render said flour injurious to health, and unless you find that all of such facts are so proven you cannot find against the claimant or condemn the flour in question under that charge in the libel, and if you fail to so find your verdict upon that count or charge in the libel must be in favor of the claimant or defendant.

* * * * *

The law does not prohibit the adding of nitrites or nitrite reacting material to flour, and a jury cannot find for the Government or against the claimant, even if it be shown that nitrites or nitrite reacting material was added to the flour in question, unless they believe from a preponderance of the evidence that such addition, if any, rendered said flour injurious to the health of those who might consume the bread or other foods made from said flour.

It is evident from the charge given and refused that the trial court regarded the addition to the flour of any poisonous ingredient as an offense within this statute, no matter how small the quantity, and whether the flour might or might not injure the health of the consumer. At least such is the purport of the part of the charge above given, and if not correct, it was clearly misleading, notwithstanding other parts of the charge seem to recognize that in order to prove adulteration it is necessary to show that the flour may be injurious to health. The testimony shows that the effect of the Alsop Process is to bleach or whiten the flour and thus make it more marketable. If the testimony introduced on the part of the respondent was believed by the jury they must necessarily have found that the added ingredient, nitrites of a poisonous character, did not have the effect to make the consumption of the flour by any possibility injurious to the health of the consumer.

The statute upon its face shows that the primary purpose of Congress was to prevent injury to the public health by the sale and transportation in interstate commerce of misbranded and adulterated foods. The legislation as against misbranding intended to make it possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was and not upon misrepresentations as to character and quality. As against adulteration, the statute was intended to protect the public health from possible injury by adding to articles of food consumption poisonous and deleterious substances which might render such articles injurious to the health of consumers. If this purpose has been effected by plain and unambiguous language, and the act is within the power of Congress, the only duty of the courts is to give it effect according to its terms. This principle has been frequently recognized in this court. *Lake County v. Rollins*, 130 U. S. 662, 670:

Where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction.

Hamilton v. Rathbone, 175 U. S. 414, 421:

The cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary.

Furthermore, all the words used in the statute should be given their proper signification and effect. *Washington Market Co. v. Hoffman*, 101 U. S. 112, 115:

We are not at liberty (said Mr. Justice Strong) to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that signification and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sec. 2, it was said that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." This rule has been repeated innumerable times.

Applying these well-known principles in considering this statute, we find that the fifth subdivision of section 7 provides that food shall be deemed to be adulterated: "If it contain any added poisonous or other added deleterious ingredient *which may render such article injurious to health.*" The instruction of the trial court permitted this statute to be read without the final and qualifying words, concerning the effect of the article upon health. If Congress had so intended the provision would have stopped with the condemnation of food which contained any added poisonous or other added deleterious ingredient. In other words, the first and familiar consideration is that, if Congress had intended to enact the statute in that form, it would have done so by choice of apt words to express that intent. It did not do so, but only condemned food containing an added poisonous or other added deleterious ingredient when such addition might render the article of food injurious to the health. Congress has here, in this statute, with its penalties and forfeitures, definitely outlined its inhibition against a particular class of adulteration.

It is not required that the article of food containing added poisonous or other added deleterious ingredients must affect the public health, and it is not incumbent upon the Government in order to make out a case to establish that fact. The act has placed upon the Government the burden of establishing, in order to secure a verdict of condemnation under this statute, that the added poisonous or deleterious substances must be such as may render such article injurious to health. The word "may" is here used in its ordinary and usual signification, there being nothing to show the intention of Congress to affix to it any other meaning. It is, says Webster, "an auxiliary verb, qualifying the meaning of another verb, by expressing ability, * * *, contingency or liability, or possibility or probability." In thus describing the offense Congress doubtless took into consideration that flour may be used in many ways, in bread, cake, gravy, broth, etc. It may be consumed, when prepared as a food, by the strong and the weak, the old and the young, the well and the sick; and it is intended that if any flour, because of any added poisonous or other deleterious ingredient, may possibly injure the health of any of these, it shall come within the ban of the statute. If it can not by any possibility, when the facts are reasonably considered, injure the health of any consumer, such flour, though having a small addition of poisonous or deleterious ingredients, may not be condemned under the act. This is the plain meaning of the words, and in our view needs no additional support by reference to reports and debates, although it may be said in passing that the meaning which we have given to the statute was well expressed by Mr. Heyburn, chairman of the committee having it in charge upon the floor of the Senate (Congressional Record, vol. 40, pt. 2, p. 1131):

As to the use of the term "poisonous," let me state that everything which contains poison is not poison. It depends on the quantity and the combination. A very large majority of the things consumed by the human family contain, under analysis, some

kind of poison, but it depends upon the combination, the chemical relation which it bears to the body in which it exists, as to whether or not it is dangerous to take into the human system.

And such is the view of the English courts construing a similar statute. The English statute provides (s. 3 of the Sale of Food and Drugs Act, 1875):

No person shall mix, color, * * * or order or permit any other person to mix, color, * * * any article of food with any ingredient or material so as to render the article injurious to health.

That section was construed in *Hull v. Horsnell*, 68 J. P. 591, which involved preserved peas, the color of which had been retained by the addition of sulphate of copper, charged to be a poisonous substance and injurious to health. There was a conviction in the lower court. Lord Alverstone, *C. J.*, in reversing and remitting the case on appeal, said:

In my opinion, if the justices convicted the appellant of an offence under s. 3 of the Sale of Food and Drugs Act, 1875, on the ground that the ingredient mixed with the article of food was injurious to health—that the sulphate of copper was injurious to health, and not on the ground that the peas by reason of the addition of sulphate of copper were rendered injurious to health, the conviction is clearly wrong. To constitute an offence under the latter part of s. 3 the article of food sold must, by the addition of an ingredient, be rendered injurious to health. All the circumstances must be examined to see whether the article of food has been rendered injurious to health.

We reach the conclusion that the Circuit Court of Appeals did not err in reversing the judgment of the District Court for error in its charge with reference to subdivision five of section 7.

The Circuit Court of Appeals reached the conclusion that there was no substantial proof to warrant the conviction, under the fourth subdivision of section 7, that the flour was mixed, colored, and stained in a manner whereby damage and inferiority was concealed. As the case is to be retried to a jury, we say nothing more upon this point.

As to the objection on constitutional grounds, it is not contended that the statute as construed by the Circuit Court of Appeals and this court is unconstitutional.

It follows that the judgment of the Circuit Court of Appeals reversing the judgment of the District Court must be affirmed, and the case remanded to the District Court for new trial.

Affirmed.

UNITED STATES v. 200 CASES OF TOMATO CATSUP.

(District Court, D. Oregon, March 9, 1914.)

211 Fed. 780; N. J. No. 3372.

Where a food product is alleged to be adulterated in that it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, *held* that it is not incumbent upon the Government to prove that such a product would be injurious to the health of the consumer.

Libel for the condemnation of certain cases of tomato catsup alleged to be adulterated. Jury waived. Decree in favor of the Government.

BEAN, *District Judge*. The United States, proceeding under the Pure Food and Drugs Act (34 Stat. 770), filed a libel in this [781]¹

¹ Numbers in brackets refer to pages of Federal Reporter.

court for the condemnation of 200 cases of tomato catsup, alleging that it was adulterated within the meaning of the act, which declares that a food product is deemed to be adulterated "if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance." After the seizure the product was claimed by the company which manufactured it and the proceedings defended. The claimant admits the interstate shipment and other jurisdictional facts, but denies that the catsup was decomposed or adulterated within the meaning of the law.

By stipulation of the parties the case was tried before the court without a jury. It turns upon two questions: First, whether the product was in fact decomposed; and, if so, whether it was "adulterated" as defined by the Pure Food Law. It was manufactured from pulp screened from peelings, cores, and by-products of tomatoes, obtained in the course of their preparation for canning. The decay or decomposition of tomatoes or tomato products is commonly the result of the attack upon the fruit in the field, or in process of manufacture, of various forms of plant life, such as yeast, bacteria, and mold. They feed upon certain compounds in the fruit, reducing the food value of the product, and producing a by-product of a more or less offensive character, and are evidences of decay and decomposition. The condiments used in the manufacture of tomato catsup have the effect of concealing decomposition or putrefaction from the senses, and its existence can most readily be determined by a bacteriological analysis of the manufactured product to ascertain whether the organisms referred to are present in sufficient quantities to indicate a decomposed state.

Various samples of the product in question have been carefully analyzed under the microscope, separately, by Dr. Schneider, of the University of California and the Government laboratory in San Francisco, and Prof. Beckwith, of the Oregon Agricultural College, both of whom are expert bacteriologists, and they agree that it contains bacteria, yeast, and mold in very large and unusual quantities, as high as from 350 million to 1 billion bacteria and 15 million yeast spores per cubic centimeter (about one-quarter of a teaspoonful) and mold hyphæ in abundance, thus indicating, in the opinion of these experts, a largely decomposed condition, Dr. Schneider says from 10 to 15 per cent, and according to their testimony it is unfit for human food. This testimony is not contradicted in any way, although the claimant was permitted to and did take samples of the goods for analysis after their seizure. Nor is there any conflict among the experts as to the scientific deductions to be made therefrom. It would seem conclusive therefore of the fact that the product is decomposed in part or in whole. The examination of the bacteriologists is confirmed by a chemical analysis made by the chemist at the Government laboratory, and in my judgment finds support in the method of manufacture. The evidence shows that the fruit from which the product in question was manufactured was brought to the factory in carload lots in boxes containing about 50 pounds each. Without being sorted or examined in any way except the merest visual examination of the outer layer of [782] fruit, the contents of the boxes were emptied for washing into a vat containing about 150 gallons of water, which was only changed once a day, except as it might be affected by a one-inch stream running into the

vat and an overflow pipe at the top. While in the water the tomatoes were stirred by a mechanical screwlike agitator, which subsequently carried them to the steaming table, where they were scalded with hot water to loosen the skin, and washed under a spray of cold water. From there they were taken in buckets to the peeling table, where the skins were removed and the tomatoes graded for canning. Then the skins, with such pulp as adhered to them, the stem ends, and like by-products were placed in buckets by the operatives and subsequently taken to another department of the factory, where they were used in the manufacture of the catsup in question.

The washing of a large quantity of fruit which necessarily is more or less infected with bacteria, mold, and decay in the manner described would naturally have a tendency to foul the water and infect the entire lot, and especially the skins and by-product from which the catsup in question was manufactured. Again, the claimant depended on the peelers or sorters to sort out and reject the decayed portions from the trimmings before they were sent to the catsup department. The peelers were paid by the piece for the peeled tomatoes only, and it is but natural that they would become careless or indifferent about the removal of the decayed material from that portion of the output for the handling of which they received no direct compensation. It therefore seems to me that the method of manufacture adopted by the claimant was calculated to produce just such a product as the bacteriologists found the one in question to be. Better methods of handling the fruit are in vogue, for it is in evidence that in other factories, the output of which was shown to be unobjectionable, the tomatoes were sorted and the decayed or infected ones removed before being washed and were washed in perforated metal cylinders by sprays of clean water.

If the testimony in this case is to be considered, and it is uncontradicted, there is, in my judgment, but one conclusion which can be reached, and that is the product in question was decomposed and adulterated within the meaning of the Food and Drugs Act.

It is argued for the claimant that since the presence of bacteria, mold, and yeast in any quantity is evidence of decomposition or the process of decomposition, and there is no fixed standard by which it can be determined when a product has reached such a stage of decomposition as to "consist in whole or in part of filthy, decomposed, or putrid vegetable substance," the Government can not prevail. I infer from the testimony of the experts that it would be difficult, if not impossible, to fix any arbitrary standard by which the question could be determined, as it depends upon so many contingencies. In any event, no such standard has been fixed, in the absence of which each case must be determined on its own facts; and when it appears, as in this case, that the product is so far decomposed as to be unfit for food it comes within the letter and spirit of the law. It was also urged that since there is no proof that the product in question would be injurious to health a verdict should be ordered in favor of the claimant; but I [783] do not understand that such proof is necessary or required under the provisions of the Food and Drugs Act, on which this proceeding is based. The object of the law is to prevent the manufacture or interstate shipment of adulterated food, and when food is adulterated so as to "consist in whole or in part of filthy, decomposed, or putrid animal or vegetable substance" its

interstate shipment is prohibited, whether its use would be injurious to health or not.

The recent decision of the Supreme Court, while not at hand, involved, as I understand from the press report, the construction of the fifth subdivision of section 7, and not the one involved in this controversy.

I conclude, therefore, that the motions for nonsuit and directed verdict should be overruled and that a decree should be entered in favor of the Government, as prayed for in the libel.

UNITED STATES v. 13 CRATES OF FROZEN EGGS.

(Circuit Court of Appeals, Second Circuit, June 3, 1914.)

N. J. No. 3411.

In a prosecution for violation of the Food and Drugs Act, it is not incumbent upon the Government to prove the wrongful intent of the shipper of an adulterated article of food.

Appeal from and in error to the District Court of the United States for the Southern District of New York, to review a decree entered upon a trial directing the condemnation of certain cases of frozen eggs seized under the Food and Drugs Act, June 30, 1906, 34 Stat. 768. Writ of error dismissed, judgment affirmed.¹

Before COXE and ROGERS, Circuit Judges, and MAYER, District Judge.

COXE, *Circuit Judge*. The question involved in this controversy is simply this—whether decayed frozen eggs taken from the shell and mixed together are within the prohibition of the act of Congress which prohibits the transportation from one State to another of any adulterated article of food.

We are clearly of the opinion that they are, and that the question of intent of either the shipper or the consignee has nothing to do with the question. The law could not be enforced if the Government is compelled, in the case of articles clearly prohibited from interstate commerce, to establish the wrongful intent of the parties. It is enough that such articles are prohibited. All that it is necessary for the Government to show is that an adulterated article of food has been transported in interstate commerce, and it has amply shown this in the present case. Judge Ray has found the facts and correctly stated the principles of law applicable.

The judgment is affirmed.

COXE, *Circuit Judge* (dismissing writ of error). In view of our decision in the case of the United States v. 13 Crates of Frozen Eggs, decided at this term, it is hardly to be expected that a conclusion in favor of the plaintiff in error would be reached herein, even if we were permitted to review the questions presented at the argument and in the briefs. But we are not permitted to review these questions, because there is no bill of exceptions. None of the questions discussed is properly before us.

The writ of error is dismissed.

¹ United States v. 13 Crates of Frozen Eggs, p. 669 *ante*, affirmed.

UNITED STATES v. 40 BARRELS AND 20 KEGS OF COCA-COLA.

(Circuit Court of Appeals, Sixth Circuit, June 13, 1914.)

Circular No. 80, Office of the Solicitor.

A beverage labeled "Coca-Cola" held to be an article of food sold under its own distinctive name, and not adulterated because of the fact that it contained caffeine.

In error to the District Court of the United States for the Eastern District of Tennessee. Affirmed.¹

Before WARRINGTON, KNAPPEN and DENISON, Circuit Judges.

DENISON, *Circuit Judge*. This proceeding was brought by the United States to condemn a quantity of syrup called Coca-Cola. Forfeiture was claimed under the Pure Food Law (34 Stat., 768), because the syrup was said to be adulterated and misbranded. The case was tried at great length before a jury; at the conclusion of the trial, the Government withdrew certain issues, and upon the two remaining matters the court instructed a verdict for the Coca-Cola Company, the claimant of the property. The sole question presented by this writ of error is whether there was any evidence tending to show that the article was either adulterated or misbranded within the prohibition of the act. The facts presented and the questions involved are so well set out by the district judge in his carefully prepared opinion (191 Fed., 431)² that we refrain from further preliminary statement. The sections and clauses of the act which it seems may have some bearing on the question before us are given in the margin.³

In applying a statute to particular facts and where it becomes necessary to construe language to which opposing sides give different meanings, it is vital to have in mind the essential scope and purpose of the act. The present case well illustrates the importance of this consideration. Much of the Government's contention as to the extent of the prohibitions here found rests upon the theory that Congress intended to protect the public health by preventing (to the extent of

¹ Affirming *United States v. 40 Barrels and 20 Kegs of Coca-Cola*, p. 395, *ante*.

² The parts of the libel voluntarily dismissed by the Government were those matters numbered 4 and 5 in the district judge's opinion; the statement on page 440 of 191 Fed. is erroneous in this respect.

³ Sec. 6. * * * the term "food," as used herein, shall include all articles used for food, drink, confectionery or condiments, by man or other animals, whether simple, mixed or compound.

Sec. 7. That, for the purposes of this act, an article shall be deemed to be adulterated * * * in the case of food * * * third, if any valuable constituent of the article has been wholly or in part abstracted * * * fifth, if it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health.

Sec. 8. That the term "misbranded" as used herein, shall apply to all drugs or articles of food or articles which enter into the composition of food, the package or label of which shall bear any statement, design or device regarding such article or ingredients or substances contained therein which shall be false or misleading in any particular * * * that for the purposes of this act, an article shall also be deemed to be misbranded * * * in the case of food: First, if it be an imitation of or offered for sale under the distinctive name of another article. Second, if it be labeled or branded so as to deceive or mislead the purchaser * * * or if it fail to bear a statement on the label of the quantity or proportion of any morphine, opium, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate or acetanilid or any derivative or preparation of any such substances contained therein * * * Fourth, if the package containing it or its label shall bear any statement, design, or device regarding the ingredients of the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases: First, in the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced. Second, * * * *And provided further*, That nothing in this act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient, to disclose their trade formulas, except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding."

the constitutional power resting in the commerce clause) the sale or transportation of deleterious foods. The opposing contention denies this broad purpose and concedes only the intent to prevent any fraud or deception in the sale of foods. The title to the act is broad enough to support the Government's utmost claim as to general purpose. It is "An act for preventing the manufacture, sale, or transportation of adulterated, or misbranded or poisonous or deleterious foods," etc. If there was nothing in the body of the act expressly prohibiting the sale of deleterious food, *qua* deleterious, this title would furnish some reason for expanding in that direction any terms of prohibition there might be, ambiguous enough to permit the implication (*Goodlett v. L & N. R. R.*, 122 U.S. 391, 408); but we find in section 11, which relates solely to importations from foreign countries, an express direction that such importation shall be wholly forbidden if the food is adulterated or misbranded, "or is otherwise dangerous to the health of the people of the United States." We have, therefore, a provision which responds to the call of the title in this particular and makes it unnecessary to resort to any otherwise unjustifiable construction for the mere purpose of giving some effect to all parts of the title. With the exception of this clause of section 11, every other directly or indirectly prohibitory clause of the act relates to articles which carry the taint of deception and fraud by being adulterated or misbranded. Section 2 prohibits interstate commerce in any article "which is adulterated or misbranded within the meaning of this act," and subsequent clauses of the same section refer to "any such article so adulterated or misbranded within the meaning of this act," and to "any such adulterated or misbranded foods." The expert examination provided for by section 4 is to determine "whether such articles are adulterated or misbranded." Section 7 defines when, for the purposes of the act, an article shall be deemed to be adulterated, and section 8 defines the term "misbranded" as used in the act, and specifies when, for the purposes of the act, an article shall be deemed to be misbranded. Section 9 prescribes a certain immunity from prosecution when there is a guaranty to the effect that the article is not adulterated or misbranded within the meaning of the act. Section 10 provides for the seizure and forfeiture of the offending articles, but its effect is limited to an article which is adulterated or misbranded within the meaning of the act. A subsequent clause of section 10 furnishes some superficial support for the broader theory of the purpose of the act by providing for the disposition of the offending article, if it "is condemned as being adulterated or misbranded, or of a poisonous or deleterious character within the meaning of this act"; but this support is only superficial, because the power to condemn, given by the first part of section 10, rests on the finding that the article is "adulterated or misbranded." This general reference to a poisonous or deleterious character as ground of condemnation must be to instances where that character, by incorporation into the article, causes the fatal adulteration or misbranding. Considering all these parts of the act, together with its title, we can not doubt that, so far as its general purpose and intent furnish any aid for interpretation, that general purpose and intent must be deemed to be the prevention of fraud and deception, so that the purchaser can get the thing he has a right to suppose he is getting, rather than the protection of the public health to the extent of preventing the purchaser from deliberately and intentionally buy-

ing a particular food which is what it purports to be, even though a jury might think it "deleterious." If argument were needed to sustain this conclusion, it could be found in the provisions as to drugs. Foods and drugs are put on the same basis throughout, save as to matters of definition and some detailed requirements. There can be no room to suppose that the act was intended to prohibit broadly the sale of all deleterious foods and not to prohibit with equal breadth the sale of all poisonous drugs. The latter supposition is impossible; and so the former can not be accepted. Further support will be found in the provisions which, by necessary implication, permit the sale of foods containing cocaine, morphine, and the like, provided the purchaser is properly advised of the contents. These views of the general purpose of the act have been accepted by the decisions, so far as they go (*Savage v. Jones*, 225 U. S. 501, 533-5; *McDermott v. Wisconsin*, 228 U. S. 115, 131; *United States v. Lexington Co.*, 232 U. S. 399, 409).

The general language of the court in the last-cited case that "the statute was intended to protect the public health from possible injury," is not at all inconsistent with the view we have expressed, because that language is used with reference to adulterations and the addition to known foods of injurious elements. The very last word "adulterated" imports fraud and deception; it implies that the article is not what it purports to be.

Under the statement of facts it is clear that the only question arising under section 7 is whether the caffeine in the Coca Cola is an "added poisonous or other added deleterious ingredient which may render such article injurious to health;" and, under the assumption made by the district judge, of which the Government can not complain, and which we here adopt, but only for the purposes of this opinion—i. e., that there was evidence requiring submission to the jury to the effect that caffeine is a poisonous or deleterious ingredient which may render the Coca Cola injurious to health—it is equally clear that the turning point is whether it can be said or whether a jury could be permitted to say that the caffeine was "added" within the meaning of this clause.

It is impossible intelligently to conceive the meaning of "added," unless we suppose a base upon which the addition is placed, and we at once meet the question: If caffeine is the addition, what is the base? For fifteen years before the passage of the act, Coca Cola has been an existing article of food (within the statutory definition of "food") and in the latter ten years of that period it had been one of the most widely known and used articles of its general class. It was a compound; it had no distinctive base (unless water, by reason of its larger proportions); it was made up of water, sugar, caffeine, phosphoric acid, glycerine, lime juice, coloring matter, flavoring matter, and "merchandise No. 5." Each of these elements is more or less important; there seems to be no method of determining their relative importance; but if any one may be rejected as comparatively negligible or secondary or noncharacteristic, that one is not caffeine. In the manufacturing process, water and sugar are boiled to make a syrup; this boiling is repeated; then caffeine is "added" and then the syrup is boiled once or twice more; the syrup is then put into a cooling tank and then into a mixing tank in which the remainder of the process is carried on and in which the other elements become part of the ulti-

mate combination. It is plain as may be that without caffeine the mixture would not be Coca Cola, and the purchaser who had been using it in its standard form fifteen years when the act was passed and who might then buy an article of the same name which did not contain any caffeine would rightfully think that he was deceived; and yet it is said that the act intended to prevent misleading the public is violated unless the public is thus misled.

It is another form of the same thought to say that the mere use of the word "adulterate" or "added" implies the existence of a standard, and it is a contradiction in terms to say that the use of an element necessary to constitute the standard is an adulteration of or addition to the standard; but, to this contradiction, the argument for the Government necessarily leads. So, further, we find that clause 3 of that division of section 7 relating to foods declares adulteration if any valuable constituent has been abstracted. Caffeine is a valuable constituent. If it is omitted, the article is adulterated and if it is included the article is adulterated. We must break clause 3 to keep clause 5.

It is urged that in case of a compound article each element is, in a proper sense, "added," and so, if any element is deleterious, it is an "added deleterious ingredient." This position not only depends in part upon what we have thought an erroneous view of the general purpose of the statute, but it destroys all force in the word "added" and gives clause 5 of that part of section 7 relating to food precisely the same meaning as if it read "if it contain any poisonous or other deleterious ingredient," etc. The deliberate and careful insertion of the word "added" before the word "poisonous," and again before the word "deleterious," while the word is omitted in the preceding almost identical clause relating to confectionery, can not be treated as accidental or meaningless. So to do would violate the settled rule of construction which requires us to "give full effect to all the words in their ordinary sense." (*Bend v. Hoyt*, 13 Pet., 263) and requires that "signification and effect shall, if possible, be carried to every word" (*Washington Co. v. Hoffman*, 101 U. S., 112, 115), and declares it the "duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed" (*Montclair v. Ramsdell*, 107 U. S., 147, 152).

Again, it is urged that the true test whether the deleterious ingredient is "added" is whether this ingredient is in its natural or in an artificial form. This criterion is supposed to find support in statements made during the congressional debates and in the well-known fact that many natural articles of food, like fruits, contain elements which in the combination formed by the complete fruit are not materially harmful, but which, when extracted and administered separately, may be injurious. This criterion may often be a useful aid in applying and interpreting the statute; but to apply it as a hard and fast rule where artificially compounded foods are under consideration comes to saying, in the case before us, that if coffee berries or tea leaves, or, we take it, the complete extract of coffee berries or tea leaves, containing the amount of caffeine now in question, were put into the compound in its manufacture, there would be no violation of the law; but that if the caffeine, and that only, which

was in these same coffee berries or tea leaves, or in some other natural product, is put into the sirup, the law is broken. Alcohol surely might be considered a "deleterious ingredient" if caffeine may be; but can we suppose that a compound food would be obnoxious to this law if it contained five per cent of alcohol purchased in the market ready distilled, and yet that a compound otherwise the same would be within the approval of the law, though it contained twenty-five per cent of alcohol distilled from grain during the process of making the compound? There has been much controversy whether "blended whisky" could be sold under that name, but it has never been thought to be forbidden merely because its alcohol was an "added" ingredient. Many wines are "fortified" by adding alcohol, and these may be obnoxious to the law for other reasons; but, if the theory now under consideration is correct, they could not be sold at all, no matter how labeled. This theory must even lead us to say that if a ground or pulverized coffee or a coffee extract is so deficient in caffeine as to be below standard the law is violated by adding from another source caffeine enough to make the coffee of full normal strength, or to say that it is a vital distinction whether the citric acid contained in any familiar and popular acid beverage is at the time of compounding squeezed from a lemon or poured from a bottle. We can not follow the argument which brings us to those results. Not only is it without basis in the statute, but it lacks inherent cogency.

We get from section 8 some help on the proper meaning of the phrase "added poisonous or deleterious ingredient," because, unquestionably, the two sections must be construed together and the same phrase should have the same construction in each. The proviso of the fourth paragraph of that part of section 8 relating to food seems to be drawn with express reference to situations like the present. Congress must have known that many proprietary articles of food and drugs were upon the market under proprietary or trade names, and Congress thought fit to provide that these things should not be deemed to be adulterated unless any deleterious ingredient contained therein was "added." This recognizes somewhat more expressly than is done by section 7 the thought that the necessity of a standard before there can be any adulteration applies as well to compounds as to simple foods, and then avoids future difficulties in application by providing that the compound article in its distinctive and known form should be the standard.

We do not overlook the argument that the act makes no distinction between compounds known at its date and those thereafter devised, and so that the construction which prevents an inherent element from being considered as "added" leaves the manufacturer at liberty to use any poison he pleases in making up his compound "food," provided only he gives to it and sells it under a distinctive name. This conclusion must, to some extent, be granted; yet it loses most of its apparent force when we remember the real purpose of the act and observe the express direction of the law that the maker of a proprietary food need not disclose its contents if he states the place of manufacture. It would seem a proper provision that if a proprietary food contains any ingredient fairly subject to be called deleterious, the maker should disclose on the label its presence and its extent, just as is required in numerous specific instances; but we can not make such

a law. On the other hand, it is difficult to suppose that Congress intended absolutely to forbid the use in any compound of any element that a jury might later call "deleterious;" but it must be one thing or the other. The prohibition is either absolute or nonexistent. The best known habit-forming drugs are selected, and implied permission is given to allow their use in compounding products for sale, provided they are named on the label; but as to the great mass of other food and drug elements which are undoubtedly deleterious if used to excess, there is no provision for naming them on the label. If they are within the definition of "added deleterious ingredient," they may never be used under any conditions or in any quantity that may be injurious to health, even though they are described in the largest of letters on the outside of the package. This way of reading the statute would practically greatly impede the progress of synthetic chemistry in foods, and we think it distinctly more unreasonable than it is to suppose that Congress, having selected and regulated the use of those things known to be particularly dangerous, thought best not wholly to forbid at that time other things from which no serious danger need be anticipated.

There is a middle view which is sufficient for the purposes of this case and which will recognize the composite meaning of "added deleterious" rather than the separate meaning of each word. This view is that in using the word "added" with reference to a possibly deleterious food ingredient, Congress had in mind an addition above and beyond the quantity in which such ingredient was normally found in usual and customary articles of food, and that no such ingredient should be considered as "added" if it was present only in the quantity in which it existed in these common articles of food with which every member of Congress was familiar, and which had generally been thought wholesome. For example: creosote and other products of destructive wood distillation are, independently considered, injurious, but they have always been present in smoked hams. Can the addition of the same preservatives to the same extent to the same meat be something that Congress intended to prohibit? The boric acid found in apples is a preservative. If certain apples which are to be preserved are not up to the maximum in this element, did Congress intend to forbid supplying the deficiency by the same element from another source? Acetic acid may, of course, be injurious; but if, by its use, an artificial vinegar is made which is chemically and in every way equivalent to the natural vinegar familiar to the members of Congress in many compounds, would they have thought of it as a deleterious addition? No example is so clear as the very one here involved. Every member of Congress had been familiar from childhood with tea and coffee; perhaps most of them drank it. The average cup of coffee contains more than two grains of caffeine; the average cup of tea one and one-half grains. A glass of Coca-Cola, as consumed, contains one and one-fifth grains of caffeine. The chemical qualities and the physiological effects of the caffeine which is in the tea or coffee and of the caffeine which is in the Coco-Cola are precisely the same. We are quite convinced that the use in an artificial beverage of a certain element which had been one of its characteristic elements for many years, and when such use was in a less proportion than the same element was known to make up in different natural beverages than in universal use and generally thought wholesome—that such an element so employed

could not have been within the meaning of Congress when it chose the words "added deleterious ingredient."

The question arising under section 8—the misbranding section—is to be determined by the proviso under the fourth clause relating to food. Separate reference to the first clause, which forbids sale "under the distinctive name of another article," is unnecessary, because the same prohibition is repeated in the proviso under clause four. We have reached the conclusion that Coca-Cola does not contain any "added poisonous or deleterious ingredients," and it is undisputed that the labels carry a statement of the place of manufacture. Hence this proviso declares that Coca-Cola shall not be deemed to be adulterated or misbranded if it was or is known as an article of food under its own distinctive name and if it is not in imitation of or offered for sale under the distinctive name of another article. It is an article of food under the definition of the statute. That it was, at the time of the passage of the law and ever since has been, known under its own distinctive name is too clear for question, except as it is said that the adopted name can not be its distinctive name because it is the distinctive name of another article. Neither is it said to be an imitation of another article, except as these words also raise the same question whether it is sold under the distinctive name of another article. Coming to that question, and just as on the subject of adulteration we must first find the standard, we here first meet the inquiry: What is the "distinctive name of another article" under which name Coca-Cola is sold? The record makes it very clear to us that there is no such other article. No article, except plaintiff's compound, is or ever has been sold "under the distinctive name," Coca-Cola. These words constitute and are the distinctive name of plaintiff's product, and they are the distinctive name of nothing else. "Coca" is indicative of one article; "cola" is indicative of another, very distinct; but "Coca-Cola" was not, in 1892, and (save for the general knowledge of plaintiff's article) is not now intelligently descriptive of any combination of the two. It might be medicine, food, or drink; it might be to swallow, smoke, or chew. These associated words as the distinctive name of any substance or combination of substances were unknown until adopted by plaintiff; that "distinctive name" is still unknown as an appellation for any other substance on the market.

The burden put upon the Government to show that Coca-Cola is masquerading under the distinctive name of another article is surely more exacting than the burden on one attacking the trade-mark to show that the name is sufficiently misleading as indicating the make-up of the product so that it is an improper trade-mark. We consider the latter question in our opinion, this day filed, in *Nashville Syrup Co. v. Coca-Cola Co.*, and conclude that the name carried no forbidden deception. We need not here repeat that discussion. If that conclusion is correct, it is even more certain that Coca-Cola is not guilty of posing "under the distinctive name of another article."

It follows that the judgment below must be affirmed.

DIGEST OF COURT DECISIONS.

ACETANILID.

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A poisonous substance. <i>United States v. Harper</i>	163
Derivatives of acetanilid contained in a drug product must be declared on the label by their proper names, but it is unnecessary to state on the label that such products are derived from acetanilid.	
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ACETPHENETIDIN. (A derivative of Acetanilid.)

See Acetanilid.

ADDED POISONOUS AND ADDED DELETERIOUS INGREDIENTS.

Under the act, an article of food other than confectionery is not deemed to be adulterated merely because it contains a poisonous or deleterious ingredient, unless such ingredient has been "added;" that is, unless it is foreign to the natural or normal composition of the article. <i>United States v. 40 Barrels and 20 Kegs of Coca-Cola</i>	395
Affirmed by the Circuit Court of Appeals for the Sixth Circuit.....	710

Where a beverage contains an added poisonous or added deleterious ingredient it is immaterial that the ingredient is present in a small quantity; if it is an appreciable quantity, the article is adulterated. <i>United States v. Koca Nola Co.</i>	213
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It was not intended by Congress that the Government must prove that an article contained an added poisonous or added deleterious ingredient in such quantities as would actually render the article injurious to health, but simply that the ingredient is of a poisonous nature or character, such as <i>may</i> render the article injurious to health. It is the character and not the quantity of the added ingredient which is to determine whether an article is adulterated. <i>United States v. 625 Sacks of Flour</i>	285
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But see <i>United States v. Lexington Mill & Elevator Co.</i>	701
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In order to show an article to be adulterated within the meaning of paragraph 5, section 7, of the act, in the case of food, it is necessary to prove, not only that the article contains an added poisonous or added deleterious ingredient, but that such ingredient actually renders the article injurious to health. <i>Lexington Mill & Elevator Co. v. United States</i>	604
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But see <i>United States v. Lexington Mill & Elevator Co.</i>	701
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To constitute adulteration within the meaning of paragraph 5, section 7, in the case of food, it is necessary to prove, not only that the article of food contains an added poisonous or added deleterious ingredient, but also that such ingredient is present in such quantity that it <i>may</i> render the article injurious to the health of the consumer. <i>United States v. Lexington Mill & Elevator Co.</i>	701
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Where it clearly appears that a poisonous substance wholly foreign to the food product has been added to it solely to mislead and deceive, the court is under no duty to endeavor to protect the offender against loss from destruction of the article by indulging in hair-splitting speculation as to whether the amount of poison used may possibly have been so nicely calculated as not to kill or be of immediate serious injury. <i>United States v. 1,950 Boxes of Macaroni</i>	267
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See Boric Acid; Caffeine; Cocaine; Formaldehyde; Martius Yellow; Nitrites and Nitrite Reacting Material; Tin, Salts of.

ADMIRALTY PROCEEDINGS.

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In declaring that "the proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty," Congress did not confer a new jurisdiction upon the district court. The proceedings after seizure take on the character of a law action and can be reviewed only by writ of error. 443 Cans of Frozen Egg Product *v. United States*-----

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Under Rev. St., Sec. 563, Subd. 8 (U. S. Comp. St., 1901, p. 457), giving United States district courts jurisdiction of all civil causes of admiralty and maritime jurisdiction, and of all seizures on land and on water not within the admiralty and maritime jurisdiction, the court in cases of seizures on land proceeds, not as a court of admiralty, but as a court of common law jurisdiction on a trial by jury. *United States v. George Spraul & Co.*-----

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The Food and Drugs Act (Sec. 10) providing that proceedings in seizure cases shall conform as near as may be to proceedings in admiralty, does not render such proceedings within the admiralty or maritime jurisdiction of the federal courts; the jurisdiction in such proceedings being conferred by the act itself. *United States v. 2 Barrels of Desiccated Eggs*-----

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See Appeal and error; Admiralty rules.

ADMIRALTY RULES.

Admiralty rule No. 1 provides that libels shall be verified, except those filed on behalf of the United States, *United States v. 2 Barrels of Desiccated Eggs*-----

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Section 10 of the act, providing that seizure proceedings shall conform as near as may be to proceedings in admiralty, does not adopt admiralty rule 22, that libels on seizure for breach of the revenue, navigation or other laws of the United States shall state the place of seizure and the district within which the property is brought and where it then is, rather than rule 23, providing that the libel, if in rem, shall state that the property is within the district. *United States v. George Spraul & Co.*-----

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Admiralty Rule 29 declares that, on the taking of a libel pro confesso, "the court shall proceed to hear the cause ex parte and adjudge therein as to law and justice shall appertain." Section 10 of the act provides that the proceedings for condemnation shall conform as near as may be to proceedings in admiralty. Held that the libel being confessed the burden was on the Government where misbranding was alleged to prove that the label contained a statement which was substantially false and misleading. *United States v. 650 Cases of Tomato Catsup*-----

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See Admiralty Proceedings; Appeal and Error; Seizure.

ADULTERATED.

The word "adulterated" imports fraud and deception; it implies that the article is not what it purports to be. *United States v. 40 Barrels and 20 Kegs of Coca-Cola*-----

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ADULTERATION.

The statute provides that any substance packed with an article which reduces, lessens, or weakens the strength of the article of food, that is, renders it less efficient, less capable of performing the purpose for which it is eaten, renders it adulterated. *United States v. Potter*-----

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The word "adulteration," as used in the Food and Drugs Act, means to corrupt, debase, or make impure by an admixture of a foreign or a baser substance. *United States v. St. Louis Coffee and Spice Mills*-----

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The ordinary use of the word "adulteration" implies an actual addition to the original substance, through human agency. But the word as used in section 7 of the act does not restrict this to addition by the hand of man; and if the adulteration of filthy, decomposed, or putrid substance has been added by nature, and is contained in the article shipped, it is adulterated in the eyes of the law. *United States v. Sprague et al.*-----

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ADULTERATION—Continued.

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In order to render an article liable to condemnation under section 10 of the act, the adulteration complained of must exist at the time of the seizure. If the adulteration has been corrected after the receipt of the article by the consignee it is not subject to seizure and condemnation. *United States v. 5 Boxes of Asafetida*----- 318

In a proceeding by way of libel for the condemnation and forfeiture of an adulterated food product, it is no defense that the article was in good condition when packed and shipped. The condition of the article when seized governs in determining whether it is adulterated. *United States v. 2,000 Cases of Canned Tomatoes*----- 342

AFFIDAVITS.

Affidavits used in support of the allegations of an information must contain a venue; and if sworn to before a notary public, must have a certificate attached showing that the person certifying them was at the time a notary public and authorized by the laws of the State or district to take and certify oaths and affirmations, and that the same was taken and subscribed as required by the laws of the State or district. If taken before a State judge or justice of the peace, or commissioner, outside of the district where the affidavit is to be used, there should be a like certificate. *United States v. Baumert et al.*----- 267

See Informations. See also United States v. Weeks, p. 836, post.

AGENTS.

Agents are jointly liable with the principal for acts done on behalf of the principal leading to a violation of the act. *United States v. Mayfield*----- 244

Inducement by an agent of the United States Department of Agriculture of an interstate shipment of a misbranded article is not a defense to a prosecution of the shipper. *United States v. Morgan et al.* 300
United States v. Schuch----- 364

See Estoppel; Inducement of Shipment.

ALMOND PASTE.

See Corn Sirup.

ANALYSIS.

The Government is not limited to the methods of analysis for vinegar set forth in Bulletin 65, Bureau of Chemistry, United States Department of Agriculture, or any other prescribed form of analysis. *United States v. 100 Barrels of Vinegar*----- 448

It is not a condition precedent to a libel proceeding for the condemnation of adulterated food under section 10 of the act that the claimant be furnished with a part of the sample taken and a copy of the results of the analysis made by the Government. *United States v. 2,000 Cases of Canned Tomatoes*----- 342

See Libels; Samples.

ANTIKAMNIA.

A drug labeled "Antikamnia Tablets" which contained acetphenetidin, held not misbranded because of a statement on the label that it contained no acetanilid and because of the failure to declare on the label that the acetphenetidin contained therein was a derivative of acetanilid. *United States v. 100 Packages of Antikamnia Tablets*----- 416

Reversed, United States v. Antikamnia Chemical Co.----- 684

See Acetanilid.

APPEAL AND ERROR.

Proceedings under section 10 of the act by way of libel for condemnation and forfeiture, after the seizure by process in rem, take on the character of common law cases, and it is inappropriate to review such cases on appeal. Such proceedings can only be reexamined according to the rule of common law, which would be by writ of error. *United States v. 779 Cases of Molasses*----- 218

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APPLES.

So-called "Tepee Apples" held misbranded as to the State where produced. United States v. 100 Cases Tepee Apples et al.....	172
<i>See Blackberries.</i>	

ASAFETIDA.

Asafoetida which did not comply with the tests prescribed by the United States Pharmacopœia when shipped, held not to be adulterated or misbranded where the article was tested by the consignee prior to seizure and correctly labeled by him to show its true standard of strength, quality and purity. United States v. 5 Boxes of Asafoetida.....	318
<i>See Adulteration; Misbranding; Original Package; Seizure.</i>	

ATTORNEYS, UNITED STATES.

The Food and Drugs Act (section 4) does not repeal Revised Statutes sections 701 or 1022, making it the duty of the district attorneys of the United States to prosecute all offenders against the laws of the United States, nor does said act limit his authority to the prosecution only of those offenders who have been accorded a hearing before the Department of Agriculture. United States v. Morgan et al.....	494
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BACTERIA.

There may be bacteria or bacilli without decomposition; but there can not be decomposition without the presence of bacteria or bacilli. United States v. F. E. Rosebrock & Co.....	343
Various forms of plant life, such as yeast, bacteria, and mold, in tomato catsup, are evidences of decay and decomposition. United States v. 200 Cases of Tomato Catsup.....	706
Though not in themselves filthy, bacteria, including B. coli and streptococci, when present in a food, indicate that such food consists in whole or in part of a filthy, decomposed or putrid animal or vegetable substance, and are therefore evidence of adulteration. United States v. Dade.....	554
A substance containing bacilli liable to cause disease, to such an extent as to make it dangerous for food purposes is "filthy" under the meaning of that word as generally used; and especially since investigation has shown that filth or dirtiness is dangerous through the germs which it contains, and not solely because of offense to the senses. United States v. Sprague et al.....	665
<i>See Filthy, Decomposed, and Putrid.</i>	

BEEMAN'S PEPSIN CHEWING GUM.

Held misbranded because of false and misleading statement on label regarding the quantity of pepsin contained therein. United States v. American Chicle Co.....	524
<i>See Curative Effect of Drugs; Distinctive Name; Election; Trade Mark.</i>	

BI-CARB-SODARINE.

Held not misbranded by reason of a statement on the label to the effect that the article is better than any other bread preparation. United States v. 165 Cases of Bi-Carb-Sodarine.....	357
<i>See Dealer's Praise.</i>	

BLACKBERRIES.

So-called "Tepee Blackberries" held misbranded as to the State in which produced. United States v. 100 Cases of Tepee Apples et al....	172
<i>See Apples.</i>	

BLEND.

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All sirups are "like substances" within the meaning of the act. Held, that sirup composed of refined cane sugar flavored with an extract of maple wood sold under a label describing it as "Western Reserve Ohio Blended Maple Syrup" is a blend within the meaning of the act and is not misbranded. United States v. 68 Cases of Syrup.

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Contra, United States v. Scanlon

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An article composed of black pepper and long pepper, labeled "Pure Pepper," held misbranded; held that said article was a blend and should have been so labeled. United States v. 75 Boxes of Alleged Pepper

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In addition to requiring, in the case of blends, that the word "blend" be stated on the label, Congress added another requirement—"Provided, That the term blend as used herein shall be construed to mean a mixture of like substances," etc. If the substances mixed are not "like substances" the statement on the label, that the product is a "blend," is not sufficient to secure immunity from seizure for misbranding. Distilled vinegar and boiled cider held to be unlike substances, and not to constitute a blend. United States v. 10 Barrels of Vinegar

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See Compound; Pepper; Syrup; Vinegar.

BOND.

See Importations.

BORIC ACID.

A poisonous and deleterious substance. United States v. 50 Cans of Preserved Whole Egg

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See Added Poisonous and Added Deleterious Ingredients; Egg Products.

BOURBON WHISKY.

See Whisky.

BRAIN-FOOD OR BRANE-FUDE.

A drug so labeled held misbranded within the meaning of the act. United States v. Harper

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See Curative Effect of Drugs.

BRANDS AND LABELS.

The act does not confer upon executive officers the power to prescribe the brands and labels upon drugs. United States v. 100 Packages of Antikamnia Tablets

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But see United States v. Antikamnia Chemical Co.

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See Labels; Regulations.

BUFFALO LITHIA WATER.

Water taken from a spring at Buffalo Lithia Springs, Mecklenburg Co., Va., and labeled "Buffalo Lithia Springs No. 2 * * * Buffalo Lithia Springs Water, Nature's Materia Medica, * * *" held misbranded because said water did not contain a sufficient amount of lithium to entitle it to be called lithia water. United States v. 7 Cases of Buffalo Lithia Water

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See Lithia Water; Standards of Purity.

BULLETIN NO. 65. BUREAU OF CHEMISTRY, UNITED STATES DEPARTMENT OF AGRICULTURE.

See Analyses.

BURDEN OF PROOF.

The burden is on the Government in proceedings for violation of section 2 of the act to establish its case beyond a reasonable doubt. United States v. Hobart

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United States v. C. F. Blanke Tea & Coffee Co.

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Von Bremen et al. v. United States

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BURDEN OF PROOF—Continued.

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Where the claimant neither answered nor contested the allegations of a libel filed under section 10 of the act, it was held to be the duty of the court, before a decree of condemnation was entered, to see that a case was made out by the libellant. The burden held to be on the Government to show that the label contained a statement substantially false or misleading. *United States v. 650 Cases of Tomato Catsup*-----

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Where confectionery alleged to contain talc was proceeded against under section 10 of the act, held that the burden was on the Government to establish by a fair preponderance of the evidence not only that the article contained talc, but that it contained an appreciable amount of talc. *United States v. 307 Cases of Confectionery*¹-----

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The burden of proof is on the Government, in proceedings instituted under section 10 of the act, to prove the offense charged by a preponderance of the evidence. *United States v. 3,000 Pounds of Frozen Eggs*-----

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United States v. 625 Sacks of Flour-----

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United States v. 175 Boxes of Macaroni-----

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The burden is on the Government in seizure cases to establish the allegations of the libel by the weight of the evidence. *United States v. 443 Cans of Frozen Egg Product*-----

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United States v. 300 Cases of Mapleine-----

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In seizure proceedings under section 10 of the act, the burden of proof is on the Government to establish its case by a higher degree of proof than a mere preponderance. It is not the ordinary burden of proof such as exists in a civil suit between two parties. *United States v. One Barrel of Desiccated Egg Product*-----

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United States v. 10 Barrels of Olives-----

280

A seizure proceeding brought by the United States under section 10 of the act is not an ordinary civil suit, neither is it an ordinary criminal suit. It occupies a place between those two proceedings. It is a suit to enforce a penalty. The remedy is a severe one, and the burden is on the Government to offer better evidence than just the mere weight. The evidence of the Government must be clear and convincing to secure a favorable verdict. *United States v. 36 Bottles of London Dry Gin*-----

647

See Reasonable Doubt.

BUTTER.

Alleged to be adulterated under act of Congress of February 17, 1898 (30 Stat. 246, c. 25). *District of Columbia v. Coburn*-----

275

CAFFEINE.

Caffeine held to be a normal constituent of Coca-Cola, and not an added ingredient within the meaning of the act. *United States v. 40 Barrels and 20 Kegs of Coca-Cola*-----

395

Affirmed by C. C. A., Sixth Circuit-----

710

Caffeine held to be an added poisonous and deleterious ingredient in a beverage called "Celery Cola." *United States v. Mayfield et al.*-----

244

See Added Poisonous and Added Deleterious Ingredients; Celery Cola; Coca-Cola.

CALCIUM ACID PHOSPHATE.

An article labeled "C. A. P.," which was composed of calcium acid phosphate and starch, and which contained no added poisonous or added deleterious ingredients, held not adulterated or misbranded by reason of the addition of starch, the presence of which was not declared on the label, because it was an article manufactured and sold under its own distinctive name. *United States v. 100 Barrels Calcium Acid Phosphate*-----

212

See Distinctive Name.

¹ Pending on writ of error in the Circuit Court of Appeals for the First Circuit.

CANCERINE.

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A drug labeled "Cancerine" held not misbranded on account of alleged false and misleading statements on its label regarding its therapeutic effect or curative powers. *United States v. Johnson*¹----- 238
 Affirmed, *United States v. Johnson*¹----- 427
See Curative Effect of Drugs.

CATSUP, COMPOUND.

Tomato catsup to which pumpkin had been added as a filler, and which was labeled "Compound Catsup," without anything on the labels under which it was sold to show the substances composing the compound, held adulterated and misbranded. *William Henning & Co. v. United States*----- 506
See Tomato Catsup.

CELERY COLA.

A beverage labeled "Celery Cola" held adulterated because it contained cocaine and caffeine, added poisonous and deleterious ingredients; and misbranded because the quantity or proportion of cocaine present was not declared on the label. *United States v. Mayfield et al*----- 244
See Added Poisonous and Added Deleterious Ingredients; Caffeine; Cocaine.

CERTIFICATE.

See Affidavits.

CHAMPAGNE.

The term "Champagne," when used alone and apart from any qualifying or descriptive words, is commonly understood to describe an effervescent or sparkling wine produced in a Province of France, the gas therein being the result of natural fermentation. Held, a bottle containing wine produced in California and labeled "Extra Dry Champagne," without any other qualifying or descriptive words, tends to mislead and deceive the purchaser into the belief that he is buying a foreign product, and is misbranded under the provisions of the act. *United States v. Schraubstadter et al*----- 393
 Affirmed, *Schraubstadter et al. v. United States*----- 564

A cheap, ordinary, low-grade, carbonated white wine is not champagne in any sense of that word, and such an article labeled "Special Gold Cabinet Extra Dry" with designs and devices upon the label and the bottle such as are ordinarily found on genuine champagne, and packed, bottled, and dressed in the same manner as genuine champagne, and sold as champagne, is misbranded. *United States v. 5 Cases of Champagne*----- 662

CHEWING GUM.

See Beeman's Pepsin Chewing Gum.

CIRCUIT COURTS OF APPEALS.

See Jurisdiction.

CIRCULARS.

Section 8 of the act, relating to misbranding, merely embraces any statement, design, or device regarding an article which appears on the outside of the package in which the article is offered for sale, and does not include an advertising circular inclosed with the package. Such a circular is not a part of the label. *United States v. American Druggists' Syndicate*¹----- 406

False or misleading statements on a circular inclosed with a drug constitutes misbranding within the meaning of the act. *United States v. Harper*----- 163

See Label.

¹ Decided prior to the enactment of the Sherley Amendment of Aug. 23, 1912.

CIRCULAR 19, UNITED STATES DEPARTMENT OF AGRICULTURE.

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*See Standards of Purity.***CIVIL CASES.**

Proceedings in rem under section 10 of the act are civil as distinguished from criminal cases. *United States v. 300 Cases of Mapleine*-----

190

*See Burden of Proof.***COCA-COLA.**

An article labeled "Coca-Cola," containing caffeine, held to be a mixture or compound sold under its own distinctive name, and not adulterated by reason of the presence of caffeine, or misbranded as being sold under the distinctive name of another article. *United States v. 40 Barrels and 20 Kegs of Coca-Cola*-----

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Affirmed by C. C. A., Sixth Circuit-----

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*See Added Poisonous and Added Deleterious Ingredients; Distinctive Name.***COCAINE.***An added poisonous and deleterious ingredient.**United States v. Koca Nola Co*-----

213

United States v. Mayfield et al-----

244

*See Added Poisonous and Added Deleterious Ingredients; Celery Cola; Delicious Dopeless Koca Nola; Koca Nola Syrup; Specific for Asthma.***COCOANUT.***See Shred Cocoonut.***COFFEE.**

Coffee shipped from Aden, Arabia, whether produced in Arabia or Abyssinia, may properly be labeled "Mocha," but it is misbranded if it fails to state on the label the name of the country in which it was produced. *United States v. Thomson & Taylor Spice Co*-----

553

An article labeled "Blanke's Kafeka * * *" is the nearest approach to coffee ever put on the market. It has all the merits without any objectionable features * * *," which was shown by proof to contain a quantity of coffee, held not misbranded by reason of said statements on the label. *United States v. C. F. Blanke Tea & Coffee Co*-----

598

An article composed almost entirely of Santos coffee, and labeled "Blanke's Mojav Coffee," held not misbranded as purporting to be a mixture of Mocha and Java coffees. *United States v. C. F. Blanke Tea & Coffee Co*-----

601

*See Regulations.***COLORED.**

The word "colored" must be held to include any artificially produced change in the natural color of the substance in a manner whereby damage or inferiority is concealed. *Lexington Mill & Elevator Co. v. United States*-----

604

*See Added Poisonous and Added Deleterious Ingredients; Flour, Bleached; Macaroni; Martius Yellow; Vanilla Extract.***COMMISSIONERS.***See Affidavits.***COMMON LAW CASES.***See Admiralty Proceedings; Seizure.***COMPOUND.**

The act (section 8) requires that a compound be labeled, branded, or tagged so as to plainly indicate the substance composing the compound; the word "compound" on the label held insufficient to secure exemption from the operation of the act relative to adulteration and misbranding. *Wm. Henning & Co. v. United States*-----

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Frank et al. v. United States-----

490

COMPOUND—Continued.

Page.

The term "Compound White Pepper" does not so naturally imply to the average purchaser a mixture of white pepper and corn product as to make it a proper branding where the statement of the ingredients is so placed and in such type as not readily to be noticed by the purchaser, and is calculated and intended to mislead and deceive the latter. *Frank et al. v. United States*-----

490

A blend is a compound, but a compound may or may not be a blend; in other words, the term "compound" does not necessarily denote a mixture of unlike substances. (*Ibid.*)

See Blend; Distinctive Name; Vanilla Extract.

CONDIMENT.

A condiment is a food and not a medicine. *Savage v. Scovell*----- 170

The condiments used in the manufacture of tomato catsup have the effect of concealing decomposition or putrefaction from the senses, and its existence can most readily be determined by a bacteriological analysis of the manufactured product to ascertain whether the organisms referred to are present in sufficient quantities to indicate a decomposed state. *United States v. 200 Cases of Tomato Catsup*-----

706

CONFECTIONERY.

An article of confectionery labeled "Ghirardelli's Italian Chocolates, G. Ghirardelli Co., San Francisco, Cal.," with colors and design of the Italian flag, which was manufactured in the United States, held not misbranded as purporting to be a foreign product. *United States v. Ghirardelli*-----

563

Confectionery labeled "Silver Dragées," coated with metallic silver, held adulterated in that it contained a mineral substance. *United States v. Oriental Dragée Co.*-----

188

United States v. French Silver Dragée Co.-----

194

Contra, French Silver Dragée Co. v. United States-----

276

Confectionery coated with metallic silver held not adulterated within the meaning of the act. *French Silver Dragée Co. v. United States*-----

276

Confectionery labeled "Pure Milk Chocolate * * * Manufactured by D. Auerbach & Sons, New York City," held not adulterated or misbranded by reason of it containing corn starch, the presence of which was not declared on the label. The article was held to be a compound sold under its own distinctive name. *United States v. D. Auerbach & Sons*-----

520

Confectionery containing talc held not adulterated within the meaning of the act. Held that the burden was on the Government to establish by a preponderance of the evidence that talc was present in the article "beyond a mere chemical trace" in order to secure condemnation of the article in a seizure proceeding. *United States v. 307 Cases of Confectionery*¹-----

516

See Construction, Rules of; Distinctive Name; Ejusdem Generis.

CONGRESS, JOURNALS OF.

In case of doubt or ambiguity the journals of the legislature may be examined for the intent of the lawmakers to ascertain facts of which such journals are evidence. *United States v. Dr. J. L. Stephens Co.*-----

466

See Construction, Rules of.

CONFLICT OF LAWS.

See Constitutionality of State Laws; Interstate Commerce.

CONGRESSIONAL COMMITTEE REPORTS.

Considered by the court in arriving at the intent of the statute. *French Silver Dragée Co. v. United States*-----

276

United States v. 150 Cases of Fruit Pudding.-----

690

See Debates in Congress.

¹ Pending on writ of error in the Circuit Court of Appeals for the First Circuit.

CONSIST.

Page.

Where food contains certain types of bacteria, or worms and beetles, it is no defense to say that such food does not "*consist* in whole or in part of a filthy, decomposed or putrid animal or vegetable substance," but that it *contains* such substances, and is therefore not adulterated within the meaning of the act. The allegation of adulteration is not that such substances in themselves are filthy, putrid, or decomposed, but that they render the article of food filthy, decomposed, or putrid. Such substances in food are evidence that such food "*consists*" in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance. *United States v. Dade*-----

554

Wm. M. Galt & Co. v. United States-----

588

CONSTITUTIONALITY OF THE FOOD AND DRUGS ACT.

The act is not unconstitutional as an attempt by Congress to exercise police powers belonging to the States. The act is not unconstitutional and void for uncertainty and indefiniteness in that no standard of grade, quality, or purity is prescribed by the act. Neither is it unconstitutional as depriving persons of property without due process of law, or as delegating legislative power to the courts. *United States v. 420 Sacks of Flour*-----

250

The Food and Drugs Act is within the legislative powers of Congress. *United States v. 100 Cases of Teepee Apples et al.*-----

172

The act is within the powers of Congress to regulate interstate commerce. *United States v. 74 Cases of Grape Juice*-----

303

United States v. 65 Casks of Liquid Extracts-----

199

The act is not an exercise of police power within the exclusive jurisdiction of the States, but is within the legislative powers of Congress as a proper regulation of interstate commerce *Shawnee Milling Co. v. Temple et al.*-----

260

Power is given Congress by the Constitution to regulate commerce and to pass all laws necessary and proper to carry that power into effect. The Food and Drugs Act is sanctioned by that power. *United States v. 8 Packages or Casks of Drug Products*-----

305

The act is not unconstitutional as being outside of the legislative powers of Congress. Section 10 of the act is not unconstitutional and void as being in contravention of the Fourth Amendment to the Constitution in allowing the seizure and condemnation of property without the filing of complaint or information under oath or affirmation. *United States v. 300 Cases of Mapleline*-----

190

The act is not unconstitutional as being *ex post facto*, or in that it contains an improper delegation of legislative power by reason of section 7 providing that a drug shall be deemed to be adulterated when "*sold under or by a name recognized in the United States Pharmacopœia (and differing) from the standard of strength, quality, or purity as determined by the test laid down in (said) Pharmacopœia * * * official at the time of investigation.*" *United States v. Lehn & Fink*-----

384

Section 9 of the act, which provides that no dealer shall be prosecuted under the act when he can establish a guaranty signed by the person from whom he purchased the article to the effect that it is not adulterated or misbranded within the meaning of the act, and providing a punishment for the person by whom the guaranty is given, is within the power vested in Congress to exclude from interstate commerce adulterated and misbranded foods. *United States v. Charles L. Heinle Specialty Co.*-----

236

Congress has the right, not only to pass laws which shall regulate legitimate commerce among the States and with foreign nations, but has full power to keep the channels of such commerce free from the transportation of illicit or harmful articles, to make such as are injurious to public health outlaws of such commerce and to bar them from the facilities and privileges thereof. Congress may itself determine the means appropriate to this purpose, and so long as they do no violence to the other provisions of the Constitution, it is itself the judge of the means to be employed in exercising the powers conferred upon it in this respect. *McDermott et al. v. Wisconsin*-----

629

CONSTITUTIONALITY OF THE FOOD AND DRUGS ACT—Continued.

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The constitutionality of the act is generally conceded and well established. *United States v. Sweet Valley Wine Co.*----- 625
See Investigation; Pharmacopœia.

CONSTITUTIONALITY OF STATE LAWS.

Inspection law of the State of Kentucky (laws 1906, p. 282, c. 48) held constitutional, and not rendered invalid by the enactment of the Food and Drugs Act, which does not conflict with its provisions. *Savage v. Scovell.*----- 170

A statute of the State of Wisconsin prescribing the manner in which corn sirup should be labeled, and prohibiting all other forms of labeling, held unconstitutional and void so far as it relates to goods brought into the State in interstate commerce which are labeled on the retail package so as to comply with the provisions of the Food and Drugs Act, and the regulations for the enforcement of said act. *McDermott et al. v. Wisconsin.*----- 629

An inspection law of Indiana (acts 1907, c. 206) regulating the sale, and requiring a statement of the formula, of concentrated commercial food for stock, held to be valid, as an exercise of the State's legislative police authority, and not unconstitutional as a burden on interstate commerce, or as being in conflict with the Food and Drugs Act, *Savage v. Jones.*----- 538

CONSTRUCTION, RULES OF.

The statute should be liberally construed to effect its beneficent purposes. *United States v. One Carload of Corno Horse & Mule Feed.*----- 434

The act is a criminal statute and should be strictly construed. *United States v. J. L. Hopkins & Co.*----- 528

It is the duty of the court, in interpreting such statutes, to keep in mind the legislative intent, the evils sought to be overcome, and if possible, to give substantial force and effect to that intent. *Wm. M. Galt & Co. v. United States.*----- 588

The law should not be given a construction or effect purely theoretical as opposed to a practical construction. *United States v. 307 Cases of Confectionery.*----- 516

It is the duty of the court to give the act a fair and reasonable construction for the accomplishment of its object; that object is the exclusion from interstate commerce of food products so adulterated as to endanger health. *United States v. 1,950 Boxes of Macaroni.*----- 267

The statute, like a written instrument, is to be construed by its express terms, from its four corners. In case of doubt and ambiguity the journals of the legislature may be examined for the intent of the law makers to ascertain facts of which such journals are evidence. *United States v. Dr. J. L. Stephens Co.*----- 466

The construction placed on the act by the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor, in the rules and regulations for the enforcement of the act are referred to by the court, not as controlling on the court by way of construing the act, but as being a reasonable construction which the court might adopt if it sees proper. *United States v. Piso Co.*----- 484

The act, while it contains penal provisions without which it can not be enforced, was enacted to remedy the great mischief resulting from the unrestricted sale of adulterated drugs and articles of food, and ought to be given, where possible, a construction that will effect the general legislative intent. *United States v. 100 Packages of Antikamnia Tablets.*----- 416

Technical rules of construction must give way to the avowed purpose and intention of the act. If it be that an act admits of more than one construction, then that one will be adopted which best serves to carry out the purpose of the act. The rule of ejusdem generis or other technical rule of construction should not be adopted where it limits the scope of the act. *United States v. Oriental Dragée Co.*----- 188

Contra, French Silver Dragée Co. v. United States.----- 276

CONSTRUCTION, RULES OF—Continued.

Page.

The rule of ejusdem generis held to govern in determining the mineral substances excluded under section 7 of the act, in the case of confectionery, in addition to those specifically enumerated. <i>United States v. French Silver Dragée Co.</i> -----	194
<i>French Silver Dragée Co. v. United States</i> -----	276
The act is to be strictly construed. <i>United States v. 65 Casks of Liquid Extracts</i> -----	199
The act is a police regulation enacted to conserve the public health. It will be construed liberally to meet the evils intended to be embraced within its provisions. <i>United States v. Dade</i> -----	554
Pure-food laws are intended to protect the public, whose members may be, and usually are, ignorant of the technical significance which ordinary words may have acquired in particular trades or industries. The true rule of construction with reference to such statutes is that words are to be given their ordinary meaning as understood by the general public. <i>United States v. Libby, McNeill & Libby</i> -----	678
<i>See</i> Object of the Act; Purpose of the Act; Remedial Statute.	

CORDIAL NON-ALCOHOLIC ROCK & REY.

An article so labeled, which was composed of syrup, glucose, prune juice, and artificial color, held to be an article sold under an "arbitrary and fanciful name," and not adulterated or misbranded. <i>United States v. Goodman</i> -----	641
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CORN MEAL.

An article labeled "Choice water ground plain meal * * *" held misbranded in that it was not ground by the direct application of water as the motive power of the mill, but was ground by electrical power; and because said article was not ground by the Hazel Green Mills as represented on the label. <i>United States v. 58 Sacks and 70 Sacks of Corn Meal</i> -----	480
<i>See</i> Knowledge and Intent; Quality; Water Ground Meal.	

CORN SIRUP (GLUCOSE).

A product containing commercial glucose held not misbranded if labeled so as to show that it contains "corn sirup." <i>United States v. 779 Cases of Molasses</i> -----	218
A product labeled "Compound: Pure Comb and Strained Honey and Corn Syrup," held not misbranded, although the percentage of corn sirup largely exceeded the percentage of honey. <i>United States v. Boeckmann</i> -----	242
Almond paste held not adulterated by reason of it containing 5 per cent of glucose (corn sirup). <i>United States v. Heide</i> -----	487
Glucose is not misbranded under the Food and Drugs Act, and the regulations for the enforcement of said act, if labeled "Corn Sirup." <i>McDermott et al. v. Wisconsin</i> -----	629
<i>See</i> Molasses.	

CORNO HORSE AND MULE FEED.

Where a substance sold under the name "Corno Horse and Mule Feed" was contained in a package labeled "Corno Horse and Mule Feed. Mixture of Ground Alfalfa, Oats, Corn, Flax, Bran, Oat and Hominy Feed, made by the Corno Mills Co., East St. Louis, Ill.," followed by a guaranteed analysis; held that such substance being a compound and so described on the package, it was not adulterated because it contained a quantity of oat hulls mixed and packed with it in excess of the amount normally present in oat feed composed of whole ground oats. <i>United States v. One Carload Corno Horse and Mule Feed</i> -----	434
<i>See</i> Construction, Rules of; Distinctive Name; Judicial Notice.	

CORPORATIONS.

The right of a corporation to be sued only in the district where it has its principal place of business and home office relates to civil actions and not to prosecutions under the Food and Drugs Act. <i>United States v. J. L. Hopkins & Co.</i> -----	568
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CORPORATIONS—Continued.

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The officers of a corporation which manufactured an adulterated and misbranded food product shipped by its manager in interstate commerce held subject to prosecution for such shipment, under section 2 of the act, where they employed the manager and authorized him to operate the plant and sell the product without restriction, and the previous course of business had been to ship such article in interstate commerce. *United States v. Mayfield et al*----- 244
See Agents; Jurisdiction.

COSTS.

In admiralty cases costs are within the discretion of the court, from which no appeal lies unless perhaps in case of gross abuse of discretion. *2,000 Cases of Canned Tomatoes v. United States*----- 342
 In no case can costs be assessed against the United States. (*Ibid.*)
 In a proceeding in rem under section 10 of the act the court has jurisdiction to enter personal judgment for the costs against the claimant, and stipulation by owner intervening is unnecessary to give the court such jurisdiction. *United States v. 50 Cans of Preserved Whole Egg*----- 227
Affirmed, Hipolite Egg Co. v. United States----- 378

COTTONSEED OIL.

See Oil, Cottonseed.

COURTS OF THE UNITED STATES.

See Police Court, District of Columbia.

CREAMTHICK.

An article labeled "Creamthick * * * Guaranteed to contain no gelatine, gum arabic, egg albumin, or similar article," held misbranded in that it contained an article similar to gum arabic, to wit, Indian gum. *United States v. Weeks*----- 643

CREAM VANILLA.

A distinctive name. *United States v. 150 Cases of Fruit Pudding*... 690

CRIMES, INFAMOUS.

Where the imprisonment authorized by law is for more than one year, the confinement must be in the penitentiary, and constitutes an infamous crime; where the punishment is for one year or less the confinement must be in the county jail, and would not be an infamous crime. Violation of section 2 of the Food and Drugs Act does not constitute an infamous crime. *United States v. J. Lindsay Wells Co.* 326
See Indictment; Information.

CRIMINAL CASES.

Cases arising under section 2 of the act are criminal cases and subject to the same rules regarding presumption of innocence and reasonable doubt as other criminal cases. *United States v. Hall-Baker Grain Co*----- 452
United States v. Heide----- 487
United States v. Schuch----- 364
United States v. Hobart----- 328
United States v. Edward Westen Tea & Spice Co----- 222
Von Bremen et al. v. United States----- 500
 Seizure proceedings under section 10 of the act are not criminal cases. *United States v. 10 Barrels of Olives*----- 280
See Burden of Proof; Reasonable Doubt.

CUFORHEDAKE.

See Brain Food or Brane-Fude.

CURATIVE EFFECT OF DRUGS.

Statements on the label or package regarding the curative effect of a drug, even though false or misleading, do not constitute misbranding within the meaning of the act. *United States v. American Drug-gists' Syndicate*¹----- 406

¹ Decided prior to the Sherley Amendment of Aug. 23, 1912.

CURATIVE EFFECT OF DRUGS—Continued.

	Page.
United States <i>v.</i> Johnson ¹ -----	238
False or misleading statements borne on the label or package containing a drug, as to the curative or therapeutic effect of the drug, constitute misbranding under the act. United States <i>v.</i> Harper ¹ -----	163
United States <i>v.</i> Schuch ¹ -----	364

DAMIANA.

An article labeled "Damiana—a Nerve Invigorator," held misbranded because it contained little or no damiana, and its label bore no statement of the quantity or proportion of alcohol contained in the article. Steinhardt Bros. & Co. <i>v.</i> United States-----	488
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DEALER'S PRAISE.

Statements in the nature of mistaken praise, or "puffing statements," do not constitute misbranding within the meaning of section 8 of the act. United States <i>v.</i> Johnson-----	427
United States <i>v.</i> 165 Cases of Bi-Carb-Sodarine-----	357
<i>See</i> Curative Effect of Drugs.	

DEBATES IN CONGRESS.

Considered by the court in arriving at the intent of Congress in the act. United States <i>v.</i> Buffalo Cold Storage Co-----	257
United States <i>v.</i> 150 Cases of Fruit Pudding-----	690
United States <i>v.</i> Lexington Mill & Elevator Co-----	701
The fact that Congress refused to incorporate in the act a provision exempting the prescriptions of regularly licensed and practicing physicians held to be practically conclusive that it was the intent of Congress that physicians should enjoy no such exemption. United States <i>v.</i> The Dr. J. T. Stephens Co-----	466
<i>See</i> Congress, Journals of; Congressional Committee Reports.	

DECEPTIVE LABEL.

If, as a matter of first impression, the label of an article tends to convey a false or misleading impression, such an article is misbranded even though a deliberate reading of the label might correct such an impression. United States <i>v.</i> 10 Barrels of Vinegar-----	410
A statement in large type on a label which conveys a false or misleading impression constitutes misbranding, even though the misleading impression created by such statement is corrected by another statement in small type. Frank et al. <i>v.</i> United States-----	490
<i>See</i> False and Misleading; Misbranding.	

DECOMPOSED.

See Filthy, Decomposed, and Putrid.

DEFENSES.

See Estoppel; Guaranty.

DELEGATION OF LEGISLATIVE POWER.

See Constitutionality; Pharmacopœia.

DELETERIOUS INGREDIENTS.

See Added Poisonous and Added Deleterious Ingredients.

DELICIOUS DOPELESS KOCA NOLA.

A beverage so labeled held adulterated because it contained cocaine, an added poisonous and deleterious ingredient; and misbranded because the presence and quantity or proportion of cocaine was not declared on the label. United States <i>v.</i> Koca Nola Co-----	213
<i>See</i> Added Poisonous and Added Deleterious Ingredients; Cocaine; Koca Nola Syrup.	

¹ Decided prior to the enactment of the Sherley Amendment of Aug. 23, 1912.

DENATURING.

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Adulterated frozen eggs, not denatured so as to prevent their use as food or labeled to show that they were intended for technical use, held to be food, and subject to condemnation. Held not incumbent on the Government to prove that they were intended for food. <i>United States v. 13 Crates of Frozen Eggs</i> -----	669
Affirmed by the C. C. A., Second Circuit-----	709

DERIVATIVES.

In addition to the trade names of the derivatives of the drugs mentioned in section 8 of the act, in the case of drugs, paragraph 2, the names of the parent substances of such derivatives should also be stated on the labels of medicines in which they are contained. <i>United States v. Antikamnia Chemical Co</i> -----	684
<i>See</i> Acetanilid; Acetphenetidin.	

DESIGNS AND DEVICES.

The act was intended to reach all forms of misrepresentation by misbranding, by the use of words or by the use of designs or devices, pictures, etc., calculated to mislead and deceive, cheat or defraud the purchasers. Designs and devices on imitation champagne which give its container the appearance of the container of genuine champagne held misleading and deceptive and to constitute misbranding. <i>United States v. 5 Cases of Champagne</i> -----	662
An indictment alleging misbranding by means of a pictorial design or device representing a German village held to be sufficient. A more particular description of the picture held unnecessary. <i>United States v. The Sweet Valley Wine Co</i> -----	625

DISTINCTIVE NAME.

An article composed of cherries bleached with sulphur, colored red and packed in liqueur flavored with essence of bitter almond is not sold under its own distinctive name when labeled "Maraschino Cherries." <i>United States v. Bettman-Johnson Co</i> -----	460
A distinctive name is one ordinarily used to clearly distinguish it, or the article to which it is applied, from all other articles; or one which the public might come to generally recognize as meaning something different from any other thing. The term "Maple Flavo" held not to be a distinctive name. <i>United States v. S. Gumpert & Co</i> -----	335
A proprietary article of food, consisting largely of corn starch, labeled "Fruit Puddine, Fruit Flavored," some flavors of which were described on the label as "Rose Vanilla" and "Cream Vanilla," held to be an article sold "under its own distinctive name." The terms "Puddine," "Fruit Puddine," "Rose Vanilla," and "Cream Vanilla" held to be distinctive names, and not to constitute misbranding. Said article held misbranded because of the false or misleading statement "Fruit Flavored" borne on the label. <i>United States v. 150 Cases of Fruit Puddine</i> -----	690
An article composed of calcium acid phosphate and starch, labeled "C. A. P.," held to be a compound sold under its own distinctive name and not adulterated or misbranded within the meaning of the act. <i>United States v. 100 Barrels of Calcium Acid Phosphate</i> -----	212
A beverage labeled "Coca-Cola" held to be a mixture or compound sold under its own distinctive name and, the name being accompanied on the label by the name of the manufacturer and the place of manufacture, not adulterated or misbranded within the meaning of the act. <i>United States v. 40 Barrels and 20 Kegs of Coca-Cola</i> -----	395
Affirmed by C. C. A., Sixth Circuit-----	710
An article labeled "Corno Horse and Mule Feed" held to be a compound sold under its own distinctive name and not adulterated or misbranded within the meaning of the act. <i>United States v. One Carload of Corno Horse and Mule Feed</i> -----	434
An article labeled "Condensed Skimmed Milk," and composed of condensed skimmed milk and cane sugar, held not to be a mixture or compound sold under its own distinctive name. <i>United States v. Libby, McNeill & Libby</i> -----	678

DISTINCTIVE NAME—Continued.

Page.

An article labeled "Grant's Hygienic Crackers" held to be an article sold under its own distinctive name and not misbranded within the meaning of the act. *United States v. Hygienic Health Food Co.* 415

A distinctive name is either one so arbitrary or fanciful as clearly to distinguish it from all other things, or one which, from common use, has come to mean a substance clearly distinguishable by the public from everything else. The term "Mapleine" held not to be a distinctive name. *United States v. 300 Cases of Mapleine*----- 190

Even though an article is sold under its own distinctive name, it is misbranded if it contain on the label any false statement regarding the ingredients of the article. *United States v. American Chicle Co.*----- 524

United States v. Weeks----- 643

United States v. 150 Cases of Fruit Pudding----- 690

An article labeled "Pure Milk Chocolate" held to be a mixture or compound sold under its own distinctive name and not adulterated or misbranded by reason of it containing starch, the presence of which was not declared on the label. *United States v. D. Auerbach & Sons*----- 520

It is not sufficient to remove an imitation and misbranded article from the condemnation of this law that it has a distinctive name applied to it, as the very language of the proviso requires that if known under its own distinctive name it, the article, must not be either an imitation of another article or offered for sale under the distinctive name of another article. *United States v. Five Cases of Champagne*----- 662

See Compound; Creamthick; Mojav Coffee; Non-Alcoholic Rock & Rey; Wright's Condensed Smoke.

DISTRICT OF COLUMBIA.

The local act of Congress, relating to the sale of adulterated food in the District of Columbia (act of Feb. 17, 1898, 30 Stat. 246, c. 25), held to be repealed by the Food and Drugs Act, June 30, 1906, only to the extent that the earlier act is repugnant to the later act. *District of Columbia v. Coburn*----- 275

See Police Court, District of Columbia.

DRUG.

It is unnecessary for the Government to prove that adulterated turpentine, which was shipped in violation of the act was known by the defendant to be intended for use as a drug rather than for mechanical purposes. *United States v. Lorick & Lowrance*----- 357

See Election.

DRUG HABIT CURE.

A drug sold as a cure for drug habit held misbranded in that the quantity or proportion of morphine present was not properly declared on the label. *United States v. The Richie Co.*----- 447

DUE PROCESS OF LAW.

See Constitutionality; Seizure.

EGG FOR CUSTARD.

An article sold as "Egg for Custard" and bearing no label, held adulterated because skimmed milk had been substituted in part for the article. *United States v. German American Specialty Co.*----- 619

EGG PRODUCTS.

A frozen egg product to which had been added a quantity of sugar, and which was alleged to consist wholly or in part of a decomposed animal substance, held not adulterated. *United States v. 443 Cans of Frozen Egg Product*¹----- 351

A frozen egg product containing formaldehyde, an added poisonous ingredient, and consisting in whole or in part of a filthy, putrid, and decomposed animal or vegetable substance, held adulterated. *United States v. F. E. Rosebrock & Co.*----- 343

¹ Reversed in the Circuit Court of Appeals, p. 507, *ante*. Circuit Court of Appeals reversed in Supreme Court, p. 582, *ante*.

EGG PRODUCTS—Continued.

Page.

Frozen eggs, containing large numbers of bacteria and having a bad odor, held adulterated in that they consisted in part of a filthy, decomposed, and putrid animal and vegetable substance. *United States v. Excelsior Baking Co.*----- 660

A desiccated egg product containing an excessive number of bacterial organisms, held adulterated in that it consisted in whole or in part of a filthy, decomposed, or putrid animal substance. *United States v. One Barrel of Desiccated Egg Product.*----- 253

Eggs shipped for tanning purposes, and not denatured or labeled so as to prevent their use as food, held to be "food" within the meaning of the act, and, as they consisted "wholly or in part of a filthy, decomposed and putrid animal substance," they were held adulterated and subject to condemnation. *United States v. 13 Crates of Frozen Eggs*----- 669

Affirmed by the C. C. A., Second Circuit.----- 709

Frozen eggs held to be adulterated in that they were "decomposed and filthy and of a poisonous and deleterious character." *United States v. 3,000 Pounds of Frozen Eggs.*----- 353

Preserved whole eggs, containing 2 per cent of boric acid, held to be adulterated in that they contained a deleterious ingredient and consisted in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance. *United States v. 50 cans of Preserved Whole Egg*----- 227

Affirmed. *Hipolite Egg Co. v. United States.*----- 378

See Added Poisonous and Added Deleterious Ingredients; Filthy, Decomposed, and Putrid; Food.

EGGS FOR TANNING.

See Denaturing; Food.

EJUSDEM GENERIS.

To fall within the prohibition expressed in the phrase "or other mineral substance," in section 7 of the act, in the case of confectionery, an article need not be ejusdem generis with the substances specifically prohibited by name, or a poisonous substance; it is sufficient if it be a mineral substance. *United States v. Oriental Dragée Co.*----- 188

Contra, *French Silver Dragée Co. v. United States.*----- 276

The term "other mineral substance," used in section 7 of the act, in the case of confectionery, is properly construed to refer only to other mineral substances ejusdem generis with those specifically mentioned in the act. *United States v. French Silver Dragée Co.*----- 194

French Silver Dragée Co. v. United States.----- 276

See Confectionery; Construction, Rules of; Judicial Notice.

ELECTION.

In a prosecution for violation of the act by misbranding, the Government can not be required to elect between counts, one of which describes the article as a drug and the other of which describes it as a food or drink, where the question is in controversy and the article would be adulterated or misbranded if either. *Steinhardt Bros. & Co. v. United States.*----- 488

United States v. American Chicle Co.----- 524

ESTOPPEL.

In a libel proceeding by the United States to forfeit certain misbranded whisky which had been shipped in interstate commerce, held to be no defense that the brand was placed on the packages containing such whisky by the United States gauger on information received from the distiller in accordance with the usual practice; or that the same kind of liquor had been for a number of years branded and sold under such brand to the knowledge of the agents and officers of the United States. *United States v. 50 Barrels of Whisky.*----- 174

EXAMINATION.

Page.

The examination provided for by section 4 of the act held to be necessary in proceedings in rem under section 10 in all cases reported by the Secretary of Agriculture for prosecution. <i>United States v. 74 Cases of Grape Juice</i> -----	303
Affirmed, <i>United States v. 74 Cases (or 20 Cases) of Grape Juice</i> -----	413
<i>United States v. Certain Cans of Syrup</i> -----	490
The examination provided for under section 4 of the act held to be unnecessary in proceedings in rem under section 10. <i>United States v. 50 Barrels of Whisky</i> -----	174
<i>United States v. 65 Casks of Liquid Extracts</i> -----	199
<i>United States v. 100 Barrels of Vinegar</i> -----	448
<i>United States v. 9 Barrels of Olives</i> -----	284
<i>See Notice and Opportunity to be Heard.</i>	

EXECUTIVE OFFICERS.

Congress may delegate to executive officers power to make regulations looking to matters of detail for the carrying out of its statutes, such as providing the method of proceeding under certain statutes, the fixing of standards, brands, and labels, or the ascertainment of any necessary facts upon which the law must operate. <i>United States v. 100 Packages of Antikamnia Tablets</i> -----	416
<i>See Constitutionality; Regulations.</i>	

EXTRA DRY.

The words "Extra Dry" on a bottle of imitation champagne indicate a grade of champagne, and such words with designs and devices of the character ordinarily found on genuine imported champagne lead the purchaser to believe that the bottle contains extra dry champagne, and constitute misbranding. <i>United States v. 5 Cases of Champagne</i> -----	662
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EXTRACT.

See Hudson's Extract; Lemon Extract or Flavor; Vanilla Extract or Flavor.

EXPORT ARTICLES.

An article intended for export if "prepared or packed according to the specifications or directions of a foreign purchaser, etc.," is not subject to seizure, even though adulterated, when judged by the standard for such article in the United States. <i>Philadelphia Pickling Co. v. United States</i> -----	612
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EX POST FACTO LEGISLATION.

See Constitutionality; Investigation; Pharmacopœia.

FACT, QUESTIONS OF.

See Jury Trials.

FALSE AND MISLEADING.

It is not necessary to show that a label actually misled the consignee, but it is necessary to show that the label was of such character as would be calculated to deceive the consignee. <i>United States v. J. L. Hopkins & Co</i> -----	528
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In finding the label of a drug to be misleading, or not so, it must be taken into consideration that the article was being shipped to men familiar with the trade and with the drug business. The question is: Was the label of such a character as to be calculated to deceive these men in the trade. (*Ibid.*)

False means, of course, untrue. Misleading means calculated to deceive; actually tending to deceive. <i>United States v. Von Bremen et al</i> -----	347
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The words "false or misleading," as used in section 8 of the act, are of the same import, and one or the other, or both, may be indifferently used. The appropriate meaning of the word "false," as extracted from the dictionary, is "adapted or intended to mislead"; and the word "misleading" means "tending to lead astray, deceptive." <i>United States v. Lehn & Fink</i> -----	384
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See Deceptive Labels; Misbranding.

FILTHY, DECOMPOSED, AND PUTRID.

Page.

The word "filthy" is capable of a variety of meanings. It is the superlative degree of such a condition as we refer to as "soiled." The word "dirty" might be considered as the comparative degree of the word "soiled," and the word "filthy" as the superlative degree. The scientific definition need not be applied to the word "decomposed," as used in the act. The sense in which "decomposed" is used in the act means that stage which, if carried somewhat further, would bring you to the state of a particular substance which would properly be called "rotten." *United States v. 10 Barrels of Olives*-----

280

Flour containing worms, insects, and beetles held adulterated in that it consisted in whole or in part of a filthy, decomposed, and putrid animal and vegetable substance. *United States v. 350 Sacks of "Princess" and 50 Sacks of "Fancy Melba" Flour*-----

513

Affirmed, *Wm. M. Galt & Co. v. United States*-----

588

Tomato paste containing yeasts and spores, bacteria, and mold filaments, and having an offensive odor, held adulterated in that it consisted in whole or in part of a filthy, decomposed, and putrid animal and vegetable substance. *United States v. Philadelphia Pickling Co.*-----

612

An article of food which is decomposed to the extent that it is unfit for human consumption might reasonably be called filthy and deleterious and, in a sense, poisonous. *United States v. 3,000 Pounds of Preserved Eggs*-----

353

Where an article is alleged to consist in whole, or in part, of a filthy, decomposed, or putrid animal substance, either one of these adjectives, if applied to the substance and established by proof, would be sufficient to justify the jury in condemning the article. Decomposition means to break up, to decompose, to resolve to its elements; so that, when fermentation proceeds far enough, an article becomes decomposed. *United States v. One Barrel of Desiccated Egg Product*-----

253

Taking the word "rotten" as expressing the general idea to which the two words "decomposed" and "putrid" may be referred, the word "decomposed" would probably represent a less advanced stage than "putrid." (*Ibid.*)

Eggs may become putrid or decomposed by the simple process of decay and the resultant or natural causes, but they will not become filthy unless something be added thereto which renders them dirty, noisome, or nasty. A "putrid" substance is in such a state of decay as to be fetid or stinking from rottenness. *United States v. F. E. Rosebrock & Co.*-----

343

It is not necessary to apply a very fine or close scientific definition to the words "filthy, putrid, and decomposed." In plain English, these words mean that the substance is rotten; that it is unfit for food for man. *United States v. Gidden*-----

522

Where a frozen egg product is so near decomposition that exact chemical and thermal precautions are necessary to prevent decomposition, then the product is, as an article of food, so close to the danger line as to excite suspicion and demand the closest judicial security before it is allowed to become an article of food consumption. *United States v. 443 Cans of Frozen Egg Product*-----

507

Milk containing bacteria, including the *B. coli* and streptococci types, held adulterated in that it consisted in whole or in part of a filthy, decomposed, and putrid animal and vegetable substance. *United States v. Dade*-----

554

The words "filthy, decomposed, and putrid" are applicable to certain conditions resulting from the presence of living organisms. *United States v. Sprague et al.*-----

665

See Bacteria; Unfit for Food.

FLAVOR.

See Lemon Extract or Flavor; Vanilla Extract or Flavor.

FLOUR, BLEACHED.

Page.

Bills in equity to restrain seizure of bleached flour by Federal officials, dismissed; the court upholding the constitutionality of the act, and declining to interfere with the officials in its enforcement. *Shawnee Milling Co. v. Temple et al.*-----

260

Flour bleached by the Alsop process held to be adulterated because, as a result of such bleaching, said flour contained nitrites or nitrite reacting material, added poisonous and added deleterious ingredients which might render the flour injurious to health; because, as a result of such bleaching, substances, to wit, nitrites and nitrite reacting material, had been mixed and packed with the flour so as to reduce, lower and injuriously affect its quality and strength; and because by such bleaching the flour was mixed, colored and stained in a manner whereby damage or inferiority was concealed. Said flour was held to be misbranded because it was offered for sale and sold under the distinctive name of another article, to wit, "Patent Flour," and because the statements "Patent Flour" and "this flour was made from the first quality hard wheat" appearing on the labels, were false and misleading. *United States v. 625 Sacks of Flour*-----

285

Reversed, *Lexington Mill & Elevator Co. v. United States*-----

604

Reversal affirmed by the Supreme Court, *United States v. Lexington Mill & Elevator Co.*-----

701

Flour bleached by the Alsop process held to be adulterated in that, as a result of such bleaching, it contained nitrites, added poisonous and deleterious ingredients which rendered such flour injurious to health; because nitrites had been mixed and packed with said flour so as to reduce and lower and injuriously affect its quality and strength; and because, by reason of such bleaching, said flour was mixed, colored and stained in a manner whereby damage and inferiority were concealed. Said flour was held to be misbranded because it was offered for sale under the distinctive name of another article, to wit, "High Patent Flour," when it was not such article, but was a flour of inferior grade to "Patent Flour"; and because the statement on the label "High Patent" was false and misleading. *United States v. 420 Sacks of Flour*-----

250

See Added Poisonous and Added Deleterious Ingredients; Mandamus; Standards of Purity.

FLOUR, PATENT.

See Standards of Purity.

FOOD.

Conceivably, an article may be both a food and a medicine, and that when used in the same way, i. e., when taken internally. A manufacturer who labels his article as a food ("International Stock Food") is in no position to complain of his article being treated as what he calls it, i. e., as a food. *Savage v. Scovell*-----

170

A condiment is a food and not a medicine. "International Stock Food" held to be a food—a condimental food. (*Ibid.*)

Where a libel for the condemnation of frozen eggs described them as articles of food, it was not subject to exception for failure to negative that the eggs were intended for other than food purposes. *United States v. 300 Cans of Frozen Eggs*-----

444

Wine is a food within the definition of food contained in section 6 of the act, and it is unnecessary that an indictment charging misbranding of wine contain an allegation that said wine is a food. *United States v. The Sweet Valley Wine Co.*-----

625

Eggs released from the shell, and frozen, are an "article of food," and if adulterated their transportation in interstate commerce is prohibited. The fact that decomposed eggs *ought not* to be used for food, or as an ingredient of some food article, does not remove them from the category of adulterated food, they being within the statutory definition; nor does the fact that they may be used for tanning purposes. The character of a thing does not depend on the intent of the owner in transporting it or selling it. *United States v. 13 Crates of Frozen Eggs*-----

669

See Election.

FOOD INSPECTION DECISION NO. 100.

Page.

See Mandamus.

FOREIGN PRODUCT.

See Gin; Italian Chocolates; Macaroni; Oil, Salad; Oil, Olive; Rusk.

FORMALDEHYDE.

A frozen egg product containing formaldehyde held adulterated in that it contained an added poisonous and deleterious ingredient, United States *v.* F. E. Rosebrock & Co.-----

343

See Added Poisonous and Added Deleterious Ingredients.

FROZEN EGG PRODUCT.

See Egg Products.

FRUIT PUDDINE.

An article sold under its own distinctive name, to wit, "Fruit Puddine" or "Puddine," held misbranded because of the false or misleading statement, "Fruit Flavored," borne on the label. United States *v.* 150 Cases of Fruit Puddine-----

690

See Distinctive Name.

GELATIN.

See Ice Cream.

GENERIC TERM.

"Generic" may be defined as meaning a class, as distinct from "specific," which might mean a particular member of a class, and when it is used in regulation 19 in connection with the word "term," so as to create the phrase "a generic term," the word "generic" means a class. "A generic term" means the description of a class of product. United States *v.* Finlayson et al.-----

672

The term "Holland," used in connection with the word gin, held to be a geographical name which has become generic by reason of long usage, and represents a style, type, or brand, within the meaning of regulation 19 (c). United States *v.* 5 Cases of Holland Gin-----

681

GEOGRAPHICAL NAME.

See Coffee; Holland Gin; Hollands Geneva Gin; London Dry Gin; Regulations; Rusk.

GIN.

See Holland Gin; Hollands Geneva Gin; London Dry Gin.

GLUCOSE.

See Corn Syrup.

GRENADINE SYRUP.

See Syrup, Grenadine.

GURANTOR.

In a prosecution for the giving of a false guaranty under section 9 of the act, held to be incumbent on the Government to show that the guarantor had some connection with the interstate shipment. United States *v.* D. B. Scully Co.¹-----

621

GURANTY.

A guaranty made under the provisions of section 9 of the act, if false, can be made with no other purpose than to defeat the object of the act. United States *v.* Charles L. Heinle Co.-----

236

¹ But see United States *v.* Glaser, Kohn & Co., N. J. No. 3400.

GUARANTY—Continued.

Page.

If, for any reason, the guaranty is insufficient to impose liability upon the manufacturer, the liability remains where it primarily rested, upon the dealer. *United States v. Mayfield et al*----- 244

A guaranty, to afford protection to a shipper under section 9 of the act, must relate to the identical article shipped by him. It is not sufficient that one constituent of the article be guaranteed. (*Ibid.*)

A guaranty given by the manufacturer of a misbranded article 18 months after a prosecution was instituted and four days before the trial of the case, held not to satisfy the requirements of a valid guaranty under section 9, and not to constitute a defense to a prosecution of the shipper of such article under the act. *Steinhardt Bros. & Co. v. United States*----- 488

A guaranty given six years prior to the prosecution, to the effect that all goods to be sold by the guarantor to a particular dealer thereafter would be free from adulteration and misbranding held to be no guaranty at all under the act. *United States v. D. B. Scully Co.*¹----- 621

See Constitutionality; Knowledge and Intent; Purpose of the Act.

GUM ARABIC.

A "similar article" to gum chadya, or Indian gum. *United States v. Weeks*----- 643

HEARINGS.

See Notice and Opportunity to be Heard.

HOLLAND GIN.

An article of domestic manufacture, labeled "Hurdle Brand Holland Gin, Distilled by Baird Daniels Co., Warehouse Point, Conn.," held not misbranded as purporting to be a foreign product. *United States v. 5 Cases of Holland Gin*----- 681

See Generic term; Regulations.

HOLLANDS GENEVA GIN.

The term "Hollands Geneva Gin" held to have come, through long usage, to indicate a style, type, or brand of gin, and not to constitute misbranding when used on a domestic article, if accompanied on the label by the name of the place where the article was manufactured. *United States v. Finlayson et al*----- 672

HONEY.

See Corn Syrup.

HUDSON'S EXTRACT.

An article labeled "Hudson's Extract" held to be misbranded in that it was an imitation of vanilla extract and was offered for sale under the distinctive name of vanilla extract. *Hudson Manufacturing Co. v. United States*----- 506

HYGIENIC CRACKERS.

See Grant's Hygienic Crackers.

ICE CREAM.

Ice cream containing only 7.09 per cent of milk fat held not adulterated by reason of deficiency in fat, as there is no authorized standard for ice cream, and the court considered it was not warranted by the evidence in placing the standard at 14 per cent milk fat. *United States v. Rinchini*----- 479

See Standards of Purity.

¹ But see *United States v. Glaser, Kohn & Co., N. J. No. 3400.*

IMITATION CHAMPAGNE.

Page.

Ordinary, cheap, low grade, carbonated wine, put up in bottles and cases simulating the appearance of champagne, and bearing words, designs, and devices such as are ordinarily employed on genuine, imported champagne, and which was sold as champagne, held misbranded in that it was an imitation of and sold under the distinctive name of another article. *United States v. 5 Cases of Champagne* -----

662

IMITATION VANILLA.

See Hudson's Extract; Vanilla Extract or Flavor.

IMPORTATIONS.

Where certain packages of imported merchandise were delivered to the importer on bond conditioned that the obligors "shall, within 10 days after the package or packages designated by the collector and sent to the public store to be opened and examined have been appraised and reported to him, be returned upon demand to the order of the collector without having been opened," held that there is no breach of the bond unless 10 days elapsed without compliance being had with a demand for a return. Demurrer to the complaint was sustained because it failed to set forth specifically the date the goods were appraised and reported and date demand was made for their return. *United States v. Psaki et al.* -----

324

Where imported olives were released to the importer on a bond conditioned that said article would be returned to the Government authorities when demanded, if a sample of the article taken for the purpose of examination was found to be adulterated or misbranded, held that the acceptance of such a bond by the Government is not equivalent to an official declaration that the olives had been found to comply with the act. *United States v. 9 Barrels of Olives* -----

284

INADVERTENCE OR MISTAKE.

See Knowledge and Intent.

INDICTMENT.

It is unnecessary that the proceedings under section 2 should be by indictment or presentment by a grand jury, as the crime charged is not infamous. Such proceedings may be by way of information. *United States v. J. Lindsay Wells Co.* -----

326

Where an indictment described the defendants as Schraubstadter & Groezinger, "doing business in the City and County of San Francisco, under the firm name and style of A. Finke's Widow," held that such phrase was merely descriptive of the persons indicted, and the indictment would be regarded as of the individual members of the firm and not of the firm under the firm name. *Schraubstadter et al. v. United States* -----

393

Where an indictment charged the defendants in three counts with misbranding, and the verdict was "guilty as charged in the indictment," held that the verdict was tantamount to a conviction on each of the three counts. (*Ibid.*)

See Crimes, Infamous; Information; Notice and Opportunity to be Heard.

INDUCEMENT OF SHIPMENT BY AN AGENT OF THE UNITED STATES.

It is the duty of officers charged with the enforcement of the different acts of Congress to use whatever means they think most successful in enforcing such acts and suppressing what Congress intended should be suppressed. Held, that the fact that the shipment of a misbranded drug was induced by an agent of the United States is not to be considered by the jury in arriving at a verdict. *United States v. Schuch* -----

364

The fact that the shipment of a misbranded article was induced by an agent of the United States, held to constitute no defense to a criminal prosecution for such shipment, in the absence of anything to show the intent of the Government agent. *United States v. Morgan et al.* -----

300

See Agents.

INFAMOUS CRIME.*See Crimes, Infamous.***INFERIORITY CONCEALED.***See Colored; Flour, bleached.***INFORMATION.**

The court has no jurisdiction to issue a warrant on an information filed, made on the information and belief of the United States attorney alone. It must be supported by proof establishing probable cause. There is no substantial doubt that offenses against the act may be prosecuted by information duly filed. *United States v. Baumert et al.*-----

267
637*United States v. Wells.*-----

It is the duty of the court to examine the information and affidavits supporting it, and if same be insufficient, to deny application of the United States attorney for leave to file the information. Motions of United States attorneys for leave to file information charging misbranding in violation of the act, denied, where, in the opinion of the court, the misbranding was doubtful. *United States v. Schurman*-----

249
186*In re Wilson.*-----

Procedure by criminal information is common-law practice, and being a matter of practice, it needs no statute to support it. Originally it was a concurrent remedy with indictments for all misdemeanors, except misprision of treason. Informations under the Food and Drugs Act are perfect representations of this ancient practice. In the United States the function of an information is limited by the constitutional provision, that no one shall be held to answer for a "capital or otherwise infamous crime" except on presentment by the grand jury. *United States v. J. L. Hopkins & Co.*-----

528

Where misbranding is doubtful the court can refuse to permit the United States attorney to file an information charging violation of the act by shipping a misbranded article. Proceedings under section 2 of the act may be by either information or indictment. *United States v. J. Lindsay Wells Co.*-----

326

An information charging a defendant with selling an adulterated or misbranded article of food in interstate commerce in violation of the act should specifically charge the manner of adulteration as defined in section 7 of the act, and of misbranding as defined by section 8. *United States v. St. Louis Coffee & Spice Mills.*-----

196

See Affidavits; Crimes, infamous; Notice and Opportunity to be Heard. See also Weeks v. United States, p. 836. post.

INJUNCTION.

The Food and Drugs Act, being a valid enactment of Congress, injunction will not issue to restrain United States officials from making seizures of flour under section 10 of the act. *Shawnee Milling Co. v. Temple et al.*-----

260.

Petition for injunction to restrain the Secretary of Agriculture from publishing a notice of a judgment of the Police Court of the District of Columbia finding the petitioner guilty of violating the Food and Drugs Act denied. Held, that said court is a "proper court of the United States" in which to prosecute violators of the act. *Huyler's v. Houston.*-----

694

*See Flour, bleached; Mandamus.***INJURIOUS TO HEALTH.**

If an article of food consists "in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance," its interstate shipment is prohibited, whether its use would be injurious to the health of the consumer or not. *United States v. 200 Cases of Tomato Catsup.*-----

706

See Filthy, decomposed, and putrid; Added poisonous and added deleterious ingredients.

INJURIOUS TO HEALTH—Continued.

Page.

It is not required that the article of food containing added poisonous or other added deleterious ingredients *must* affect the public health, and it is not incumbent upon the Government in order to make out a case to establish that fact. The act has placed upon the Government the burden of establishing, in order to secure a verdict of condemnation under this statute, that the added poisonous or deleterious substances must be such as *may* render such article injurious to health. If it can not, by any possibility, when the facts are reasonably considered, injure the health of the consumer, such article, though having a small addition of poisonous or deleterious ingredients, may not be condemned under the statute. *United States v. Lexington Mill & Elevator Co.*-----

701

INNUENDO.

An innuendo may not change, add to, enlarge the sense of expressions beyond their usual meaning. It may serve as an explanation, but not as a substitute. Consequently, an averment in an information that one who branded an article with a label whose accepted and usual significance correctly described the article, intended that the public or purchaser should understand that the label had another and unusual significance, fails to disclose any misbranding. *Nave-McCord Mercantile Co. v. United States.*-----

316

INSPECTORS.

See Agents; Inducement of shipment.

INTENT.

See Knowledge and Intent.

INTENT OF THE ACT.

See Object of the act; Purpose of the act.

INTERSTATE COMMERCE.

It was interstate commerce for the owner to ship an article of food from his own place of business in New Jersey to himself in Pennsylvania for a business purpose, such as an examination and test of the article; and as the food was adulterated, such a shipment was in violation of the act. *Philadelphia Pickling Co. v. United States.*-----

612

Traffic by mail is interstate commerce. *United States v. Tucker.*

404

Where a drug was shipped from the manufacturing agent in one State to the owner of the secret formula for its manufacture in another State to be bottled and labeled by the owner in the State to which it was shipped before being offered for sale, held that the shipment was not in interstate commerce within the meaning of the act, and not subject to seizure under section 10, because the casks containing it were not labeled so as to show the quantity or proportion of alcohol contained in the preparation. *United States v. 65 Casks of Liquid Extract.*-----

199

The State has power to make regulations for the protection of its people against fraud or imposition by impure food or drugs, but the State may not under the guise of exercising its police power, or otherwise, impose burdens upon or discriminate against interstate commerce, nor may it enact legislation in conflict with the statutes of Congress passed for the regulation of the subject, and if it does, to the extent that the State law interferes with or frustrates the operation of the acts of Congress, its provisions must yield to the superior Federal power given to Congress by the Constitution. *McDermott et al. v. Wisconsin.*-----

629

To determine the time when an article passes out of interstate into State jurisdiction for the purpose of taxation, is an entirely different matter from deciding when an article which has violated a Federal prohibition becomes immune. It was not intended to limit the right of Congress, now asserted, to keep the channels of interstate commerce free from the carriage of injurious or fraudulently branded articles and to choose appropriate means to that end. The legislative means provided in the Federal law for its enforcement

INTERSTATE COMMERCE—Continued.

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may not be thwarted by State legislation having a direct effect to impair the efficient exercise of such means. *McDermott et al v. Wisconsin*-----

629

A State can not, under its police power, directly regulate or burden interstate commerce, and any statute which even affects incidentally interstate commerce is invalid if repugnant to the Food and Drugs Act, June 30, 1906; but a police regulation of a State which has real relation to the protection of the people of the State and is reasonable in its terms, and does not conflict with any valid act of Congress, is not unconstitutional because it may incidentally affect interstate commerce. *Savage v. Jones*-----

538

It is interstate commerce for a person to ship an article of food from one State to himself in another State. *United States v. 300 Cans of Frozen Eggs*-----

441

See Sale; Shipment.

INTRODUCTION (SECTION 2).

One of the principal objects of the act was to prevent the *introduction* into interstate commerce of adulterated or misbranded foods, and it is immaterial that such foods are not intended for sale. *Philadelphia Pickling Co. v. United States*-----

612

See Interstate Commerce; Object of the Act; Purpose of the Act.

INVESTIGATION.

The word "investigation" used in section 7 of the act, paragraph 1, in the case of drugs, is not necessarily identical in meaning with the word "examination" used in section 4 of the act. *United States v. Lehn & Fink*-----

384

The investigation by the Department of Agriculture, provided for in section 4 of the act, is necessary in all cases reported by the Secretary of Agriculture for seizure proceedings under section 10 of the act. *United States v. 74 Cases of Grape Juice*-----

303

Affirmed, United States v. 74 Cases (or 20 Cases) of Grape Juice---

413

United States v. Certain Cans of Syrup-----

490

The investigation provided for by section 4 of the act refers to cases in which there is to be a prosecution under section 5 for the enforcement of the penalties prescribed by section 2, and not to cases where forfeiture proceedings are contemplated for condemnation, as authorized by section 10 of the act; so that it is no objection to forfeiture proceedings that no prior investigation had been instituted by the Secretary of Agriculture under section 4. *United States v. 100 Barrels of Vinegar*-----

448

See Constitutionality; Ex Post Facto; Notice and Opportunity to be Heard; Pharmacopœia.

ITALIAN CHOCOLATES.

See Confectionery.

JUDGES, STATE.

See Affidavits.

JUDICIAL NOTICE.

Judicial notice will be taken of the fact that good, sound wheat of the best variety, properly and timely harvested, put through the sweat in the stack, well ground and bolted, makes nutritious, wholesome white flour. *Shawnee Milling Co. v. Temple et al*-----

260

Judicial notice may be taken of the fact that screening or sifting is one of the processes of catsup making. *United States v. 650 Cases of Tomato Catsup*-----

183

Judicial notice may be taken of the fact that cider vinegar is far superior to distilled vinegar. *United States v. 10 Barrels of Vinegar*---

410

Judicial notice may be taken of the fact that standard lexicographers define the words "salad oil" as "olive oil." *Von Bremen et al. v. United States*-----

500

Where a court is required to take judicial notice of the meaning of a term as a matter of law, it may resort to any authoritative

JUDICIAL NOTICE—Continued.

Page.

sources of information to enlighten its judgment. <i>United States v. One Carload of Corno Horse and Mule Feed</i> -----	434
The court may take judicial notice of the nature of the substances declared to be adulterants in section 7 of the act, in the case of confectionery. <i>United States v. French Silver Dragée Co</i> -----	194

JURISDICTION.

In seizures under section 10 of the act, and on land, the proceedings in the district court are at law, and the circuit courts of appeals are without jurisdiction to review the same on appeal; such review must be by writ of error. <i>Hudson Manufacturing Co. v. United States</i> ----	506
<i>United States v. 779 Cases of Molasses</i> -----	218
443 Cases of Frozen Eggs <i>v. United States</i> -----	582
<i>United States v. 3 Barrels of Vanilla Tonka and Compound</i> -----	586

Under section 2 of the act, the gist of the offense is shipping or delivering for shipment of adulterated or misbranded articles of foods or drugs to be introduced into another State by interstate commerce, and, hence, jurisdiction exists in the Federal court in the district from which the goods were shipped, though the defendant did not reside in that district. <i>United States v. J. L. Hopkins & Co</i> ----	568
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Where the validity of one of the regulations made pursuant to section 3 of the act was questioned and denied; held, that the Supreme Court had jurisdiction to review the judgment of the Court of Appeals, on the ground that <i>an authority exercised under the United States</i> was questioned and denied. <i>United States v. Antikamnia Chemical Co</i> -----	684
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Under section 10 of the Food and Drugs Act, June 30, 1906, it is enough to give the Federal Government jurisdiction over adulterated or misbranded foods and drugs which have been shipped in interstate commerce if the articles are unsold, whether in original packages or not. Bearing in mind the authority of Congress to make efficient regulations to keep impure or misbranded articles out of the channels of interstate commerce, the provisions of section 10 are clearly within its power. Held, that adulterated and misbranded articles of drugs are contraband of interstate commerce, and even though the original package may have been broken and destroyed, if the retail packages remain unsold, they are subject to seizure under section 10 of the act. <i>McDermott et al. v. Wisconsin</i> -----	629
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See Admiralty Proceedings; Appeal and Error; Notice and Opportunity to be Heard; Original Unbroken Packages; Police Court, District of Columbia; Regulations; Seizures.

JURY TRIALS.

The right to trial by jury granted by section 10 of the act, on demand of either party, is absolute, and means a trial by jury according to the established practice in courts of common law. <i>United States v. 779 Cases of Molasses</i> -----	218
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Under the Constitution of the United States, article 3, section 2, which provides that the trial of all crimes, except in cases of impeachment, shall be by jury, if an offense amounting to a crime should not be tried by jury, the judgment would be a mere nullity, and would require reversal. The trial of a "petty offense" under waiver of jury would amount to an arbitration as to the questions of fact involved, and the court's conclusion of fact could not be reviewed. <i>Frank et al. v. United States</i> -----	490
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See Appeal and Error; Petty Offenses.

JUSTICES OF THE PEACE.

See Affidavits.

KAFEKA, BLANKE'S.

Held not misbranded. <i>United States v. C. F. Blanke Tea & Coffee Co</i> -----	598
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KARO CORN SYRUP.

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Articles labeled "Karo Corn Syrup, 10% Cane Syrup, 90% Corn Syrup," and "Karo Corn Syrup with Cane Flavor, Corn Syrup 85%," held not misbranded within the meaning of the Food and Drugs Act, June 30, 1906; and held, that a statute of the State of Wisconsin requiring that such articles be labeled "Glucose flavored with refiners syrup" is unconstitutional as an interference with the Federal authority to regulate interstate commerce. *McDermott et al. v. Wisconsin*-----

629

KNOWLEDGE AND INTENT.

The act does not expressly provide that shippers or dealers must knowingly or wilfully violate its provisions; but if a false label was inadvertently placed on an article by a mistake of an employee, the defendant should not be held guilty of misbranding. *United States v. S. Gumpert & Co.*-----

335

United States v. Lehn & Fink-----

384

The object of the act is to enable the consumer to know what it is in the way of food or drugs that he is putting into his stomach; and to punish anybody who, whether by wilful design, or carelessness, or inadvertence—it makes no difference which—puts forth for human consumption as food or drug that which is not what it pretends to be. *United States v. Lehn & Fink*-----

579

Proof of the absence of knowledge on the dealer's part that an article is obnoxious to some provision of the act is only a defense where the article is purchased from a manufacturer and a guaranty taken from the manufacturer that it complies with the requirements of the act. *United States v. Mayfield et al.*-----

244

It is unnecessary to prove that the defendant had knowledge that the article shipped by him was adulterated. He is charged with a knowledge of the contents of the article. *United States v. Griebler.*

182

United States v. The Piso Co.-----

484

United States v. Hall-Baker Grain Co.-----

452

United States v. Excelsior Baking Co.-----

660

United States v. Sprague et al.-----

665

An article of food or drug which is adulterated or misbranded is an offending thing which threatens the health of the citizen, and is therefore subject to seizure and forfeiture without regard to the acts or knowledge of the owners or claimants. The question of intent does not enter into the case. *United States v. 5 Boxes of Asafœtida*-----

318

United States v. 58 Sacks and 70 Sacks of Corn Meal-----

480

The question of the defendant's intent to violate the law does not enter into a case prosecuted under section 2 of the act. The question is, Was the law violated? *United States v. Gidden*-----

522

United States v. J. L. Hopkins & Co.-----

528

United States v. Griebler-----

182

United States v. Johnson-----

427

The intent follows the act. The true construction of the Food and Drugs Act is that the dealer or manufacturer sells a commodity at his peril, and he is bound to understand the ingredients of the product. *United States v. Hobart*-----

328

In a prosecution under the act for the giving of a false guaranty the criminal intent essential to the commission of the offense existed at the time the defendant gave the certificate specifying that it was under the act of June 30, 1906; and such a certificate could only be given for the purpose of evading the provisions of the act of Congress. *United States v. Chas. L. Heinle Specialty Co.*-----

236

It makes no difference, in a case where misbranding is alleged, whether the failure to tell the truth was the result of design or was merely unintentional or accidental. The act of Congress has chosen to punish the failure to tell the truth. *United States v. 36 Bottles of London Dry Gin*-----

647

KNOWLEDGE AND INTENT—Continued.

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The act nowhere requires proof of intention by the use of the words knowingly, wilfully, or like words. It would be destructive of the act, and nullify it entirely, to allow the intent of the person violating it to be considered as a defense. *United States v. 36 Bottles of London Dry Gin*.....

695

Where adulterated frozen eggs were shipped in interstate commerce, not labeled "for technical purposes," or denatured so as to prevent their use as food, held that they were food, no matter what the intent of the shipper may have been; and it was unnecessary for the Government to prove that they were intended for food. *United States v. 13 Crates of Frozen Eggs*.....

709

See Purpose of the act.

KOCA NOLA SYRUP.

An article labeled "Koca Nola Syrup" held adulterated because it contained cocaine, an added poisonous and deleterious ingredient, and misbranded because the presence, quantity, or proportion of cocaine was not declared on the label. *United States v. Koca Nola Co.*.....

213

See Added Poisonous and Added Deleterious Ingredients; Delicious Dopeless Koca Nola.

LABEL.

The label referred to in sections 7 and 8 of the act is the label on the package the ultimate consumer buys, and not alone the label on the package in which the retail package was shipped to the retailer. *United States v. Dr. J. L. Stephens Co.*.....

466

Affirmed, Dr. J. L. Stephens Co. v. United States......

628

The act does not require any label on packages of foods or drugs shipped in interstate commerce, except by inference; but where a drug shipped in interstate commerce bears a label, such label must contain the information required by section 7 of the act. *United States v. 8 Packages or Casks of Drug Products*.....

305

The act not only requires that drugs shipped in interstate commerce shall not be misbranded, but also requires that they shall be labeled with labels conforming to its requirements. *United States v. 65 Casks of Liquid Extract*.....

199

The word "label" as used in the act, which requires packages of drugs shipped in interstate commerce to bear a statement on the label of the quantity or proportion of alcohol, etc., means a descriptive paper affixed to the package which must include a statement of how much alcohol, etc., is contained in the package. (*Ibid.*)

Where an article of food was shipped in carload lots and bore no label, the invoice sheet and certificate of inspection were held to constitute a label within the meaning of the act in a prosecution of the shipper for misbranding. *United States v. Hall-Baker Grain Co.*.....

452

Reversed, Hall-Baker Grain Co. v. United States......

557

In case of a clear violation of the statute there is no occasion for granting the respondents opportunity to correct their labels, but in cases where the violation is doubtful and respondents have acted in good faith in being willing to correct their labels to comply with the law, such an opportunity should be granted. *United States v. Schurman et al.*.....

249

The label referred to in the Food and Drugs Act includes the label which appears on the retail package or other package which goes to the ultimate consumer. *McDermott et al. v. Wisconsin*.....

629

See Circulars.

LEGISLATIVE HISTORY OF THE ACT.

Considered by the court in arriving at the intent of the lawmakers. *United States v. Johnson*.....

427

United States v. 150 Cases of Fruit Pudding.....

690

LEMON EXTRACT OR FLAVOR.

Articles labeled "Pure Lemon Flavor" and "Flavor of Lemon" held adulterated and misbranded because not of the standard of strength prescribed for lemon extract. The terms "flavor" and "extract" held to be synonymous. *United States v. Edward Westen Tea & Spice Co.*.....

222

LEMON EXTRACT OR FLAVOR—Continued.

But see <i>United States v. St. Louis Coffee & Spice Mills</i>	196
An averment in an information that the defendant intended that the label "Flavor of Lemon and Citral—A Pure Flavor" should be understood by the public and purchasers to mean pure flavor or extract of lemon, is futile, because the accepted and usual signification of the label is not that the article is a pure flavor or extract of lemon, but that it is a flavor of lemon and citral. <i>Nave-McCord Mercantile Co. v. United States</i>	316
An article labeled and sold as "Extract Terpeneless Lemon" held adulterated and misbranded because it contained only 0.05 per cent of citral derived from the oil of lemon, and was, therefore, below the standard of purity for said article, which calls for 0.02 per cent of citral derived from the oil of lemon. <i>United States v. Frank et al.</i> ...	360
An article labeled "Extract of Lemon Peel" held misbranded because it was not a true extract of lemon peel, but a dilute extract containing no oil of lemon peel. <i>United States v. S. Gumpert & Co.</i> ...	335
<i>See Innuendo; Standards of Purity.</i>	

LIBEL.

Where a libel to forfeit certain syrup for alleged violation of the act stated that the boxes and bottles did not contain a blend of maple syrup, as stated on the labels, but alleged that the article consisted of a mixture or compound of refined cane sugar flavored with an extract of maple wood, the negation of a blend of maple syrup was a conclusion of the pleader and was not admitted by a demurrer to the libel. <i>United States v. 68 Cases of Syrup</i>	216
Libels filed, under section 10 of the act, for the seizure, condemnation, and forfeiture of adulterated and misbranded articles of food and drugs are not governed by the strict rules of the common law in regard to indictments or criminal information. <i>United States v. 2 Barrels of Desiccated Eggs</i>	388
Where a libel was filed under section 10 of the act, for the seizure, condemnation, and forfeiture of adulterated tomato catsup, the allegation in the libel that such article is "unfit for food" may be regarded as surplusage because the other language completely and distinctly describes an offense. Even in an indictment, such surplus language is not fatal. <i>United States v. 275 Cases of Tomato Catsup</i> ...	297
In a proceeding under section 10 of the act by way of libel for the condemnation and forfeiture of adulterated or misbranded articles of food or drug, it is not necessary that the libel show that the proceeding was commenced on information furnished by the Secretary of Agriculture or by a health officer or agent of a State, Territory, or the District of Columbia. <i>United States v. 2,000 Cases of Canned Tomatoes</i>	342
Want of sufficient verification of a libel to forfeit food under section 10 of the act is not ground for exception or demurrer to the substance of the libel. Admiralty Rule No. 1 provides that libels shall be verified, except those filed on behalf of the United States. <i>United States v. 2 Barrels of Desiccated Eggs</i>	388
<i>United States v. 300 Cases of Mapleine</i>	190
In a proceeding to forfeit goods for adulteration or misbranding under section 10 of the act, the libel should be supported by the affidavit of some one cognizant of the facts showing probable cause. <i>United States v. 8 Packages or Casks of Drug Products</i>	305
<i>See Affidavits; Notice and Opportunity to be Heard; Sale; Seizure.</i>	

LIMITATIONS, STATUTE OF.

The general three years statute of limitations applicable to crimes was not repealed by the Food and Drugs Act (section 5), containing no specific limitation on prosecutions thereunder, so as to require immediate prosecution on the theory that in case of delay the right to prosecute would be barred by laches. <i>United States v. J. L. Hopkins & Co.</i>	563
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LITHIA WATER.

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The term "lithia water," as ordinarily understood, means a water containing a sufficient amount of lithium to give a therapeutic effect when drunk in reasonable quantities. *United States v. 7 Cases of Buffalo Lithia Water*..... 697
See Buffalo Lithia Water; Standards of Purity.

LONDON DRY GIN.

There is a distinct kind of gin known as London Dry Gin, and the name "London Dry Gin" when applied to that particular kind of gin made in New York does not constitute misbranding. *United States v. 36 Bottles of London Dry Gin*..... 647
Reversed by the Circuit Court of Appeals, Third Circuit..... 695

MACARONI.

Macaroni, to which a coal tar dye known as "martius yellow" had been added as coloring matter, held adulterated within the meaning of section 7 of the act, in that it contained an added poisonous ingredient which might render it injurious to health. *United States v. 1,950 Boxes of Macaroni*..... 267
Macaroni, containing an insubstantial amount of artificial coloring matter, the presence of which was inconspicuously declared on the label, and bearing also on the label scenes and pictures alleged to represent scenes in Italy and pictures of Italian life, held not misbranded. United States v. 175 Boxes of Macaroni..... 591
See Added Poisonous and Added Deleterious Ingredients.

MAIL, SHIPMENTS BY.

See Interstate Commerce.

MANDAMUS.

Petition for writ of mandamus to restrain the Secretary of Agriculture from issuing Food Inspection Decision No. 100, relating to bleached flour, and to compel cancellation of said decision, denied, on the ground that the interest of the petitioner in the subject matter was too remote, and because the actions of the Secretary in the matter involved the exercise of discretion, and were not ministerial in character. *Alsop Process Co., Petitioner, v. James Wilson, Secretary of Agriculture*..... 206

MAPLE FLAVO.

An article composed of glucose and sugar, and artificially colored and flavored, held misbranded because the label represented it to be a true maple product when not so. The term "Maple Flavo" held not to be a distinctive name within the meaning of the act. *United States v. S. Gumpert & Co.*..... 335
See Distinctive Name.

MAPLEINE.

The term "Mapleine" held not to be a distinctive name within the meaning of the act, and its use on the label of an article containing no maple product held to constitute misbranding of the article so labeled. *United States v. 300 Cases of Mapleine*..... 190

MAPLE SYRUP.

Maple syrup is popularly recognized as the syrup made by boiling down the sap that flows in the spring of the year from the live maple tree. *United States v. Scanlon*..... 181
See Maplewood Extract; Syrup.

MAPLEWOOD EXTRACT.

An extract made from the wood of maple trees after the trees have been cut down is not properly labeled "Maple Syrup." *United States v. Scanlon*..... 181
An extract made from the wood of the maple tree after it has been cut down held to be a "like substance" to cane sugar, and to constitute a blend within the meaning of the act. *United States v. 68 Cases of Syrup*..... 216
See Blend; Maple Syrup; Syrup.

MARASCHINO CHERRIES.

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Maraschino is a liqueur or cordial, high in alcohol, produced from the fruit, leaves, and bark of the marasque cherry tree, which grows indigenous in Dalmatia, Austria. Cherries packed in a weak, sweet liqueur, artificially colored and highly flavored with essence of bitter almonds, and not produced from the marasque cherry tree, held misbranded. *United States v. Bettman-Johnson Co.*-----

460

See Distinctive Name.

MARTIUS YELLOW.

An added poisonous and deleterious ingredient. *United States v. 1,950 Boxes of Macaroni.*-----

267

See Added Poisonous and Added Deleterious Ingredients; Macaroni.

MILK.

Milk containing bacteria, including the *Bacillus coli* and streptococci types, held adulterated in that it consisted, in whole or in part, of a filthy, decomposed, and putrid animal and vegetable substance. *United States v. Dade.*-----

554

MILK, CONDENSED SKIMMED.

An article labeled "Condensed Skimmed Milk," and containing about 42 per cent of cane sugar, the presence of which was not declared on the label, held adulterated and misbranded. *United States v. Libby, McNeill & Libby.*-----

678

See Distinctive Names.

MILK CHOCOLATE.

See Confectionery.

MINERAL SUBSTANCES.

See Confectionery; Ejusdem Generis.

MISBRANDING.

Where a libel filed under section 10 of the act charges misbranding it is essential that the libel should set forth the branding and the facts inconsistent therewith. If there is indefiniteness in the statement, such indefiniteness must be removed by proof. *United States v. 650 Cases of Tomato Catsup.*-----

183

The purpose of the act was to protect consumers against impure and adulterated foods and drugs, and also against the use of food and drugs which do not show what they contain by the brands on the package. *United States v. Mayfield et al.*-----

244

Where misbranding is corrected after an article is received in interstate commerce and before it is seized for condemnation and forfeiture, it is not subject to seizure. *United States v. 5 Boxes of Asafoetida.*-----

318

If an article contains some quantity of a certain ingredient, no matter how small the quantity, if it is appreciable, the use of the name of such ingredient on the label is not misbranding within the meaning of the act. *United States v. American Druggists' Syndicate.*-----

406

A food product labeled "Compound: Pure Comb and Strained Honey and Corn Syrup" held not misbranded on account of the percentage of corn syrup largely exceeding that of honey. *United States v. Boeckmann.*-----

242

A syrup, composed of maple sugar 10 per cent and white sugar 90 per cent, labeled "Gold Leaf Syrup," with a trade-mark consisting of a gold leaf in the form of a maple leaf, and bearing the statement in distinct type "Composed of maple and white sugar," with name of maker, can not be said to be misbranded on account of the proportion of white sugar exceeding the proportion of maple sugar. *In re Wilson.*-----

186

See Agents; Curative Effect of Drugs; Estoppel; Labels.

MISLEADING.

See False and Misleading.

MIXTURES.

Page.

The prohibition of the act against mixing or packing with an article of food any substance which will reduce, lower, or injuriously affect its quality or strength, includes chemical compounds as well as mechanical mixtures. The evil intended to be remedied by the statute is not limited to a mechanical mixture, but is just as potent when a chemical union results from the two substances with the deleterious effect intended to be prevented by the act. *Lexington Mill & Elevator Co. v. United States*----- 604
See Blend; Compound.

MOJAV COFFEE.

An article composed almost entirely of Santos coffee, and labeled "Blanke's Mojav Coffee," held not misbranded as purporting to be a mixture of Mocha and Java coffees. *United States v. C. F. Blanke Tea & Coffee Co.*----- 601

MOLASSES.

Molasses to which had been added glucose and which was sold as molasses under the label "No. 1 Fancy," held misbranded in that it was offered for sale and sold under the distinctive name of another article, to wit, molasses. *United States v. Hobart*----- 328

Molasses labeled "Sugar Glen Compound Molasses and Corn Syrup" and "Burro Brand Molasses and Corn Syrup," with statements on the label in several places declaring the presence of corn syrup, held not misbranded within the meaning of the act. *United States v. 779 Cases of Molasses*----- 218
See Corn Syrup; Regulations.

MORPHINE.

Improperly declared on label. *United States v. The Richie Co.*----- 447

MOTIVE.

See Knowledge and Intent.

NARCOTIC DRUGS.

It is eminently proper that when one buys a patent medicine he should know whether it contains injurious substances, and it is proper when one buys a drug or mixture, a patent medicine, or anything which is ordinarily handled with great care, that there should be a statement on the package to the effect that such a substance is in the mixture. The purpose of the act was to prevent people from taking narcotic drugs and other deleterious substances unwittingly. *United States v. The Piso Co.*----- 484
See Purpose of the Act.

NITRITES AND NITRITE REACTING MATERIAL.

Nitrites and nitrite reacting material present in flour as a result of bleaching by the Alsop process, held to be added deleterious ingredients which might render the flour injurious to health, and to constitute adulteration within the meaning of the act. *United States v. 420 Sacks of Flour*----- 250

United States v. 625 Sacks of Flour----- 285

Contra, Lexington Mill & Elevator Co. v. United States (reversing United States v. 625 Sacks of Flour)----- 604

Judgment of the Circuit Court of Appeals for the Eighth Circuit, in *Lexington Mill & Elevator Co. v. United States*, affirmed by the Supreme Court. *United States v. Lexington Mill & Elevator Co.*----- 701
See Added Poisonous and Added Deleterious Ingredients; Flour Bleached.

NOTARIES PUBLIC.

See Affidavits.

NOTICE AND OPPORTUNITY TO BE HEARD.

Page.

Held to be necessary in all cases where criminal prosecution is instigated by officers or agents of the Department of Agriculture to allege in the information that the defendant was given notice and opportunity to be heard, as provided in section 4 of the act; and that proof of such facts be made at the trial. *United States v. Morgan et al*.....

300

United States v. Mohn Wine Co......

477

But see *United States v. Morgan et al.*.....

494

An information under the Food and Drugs Act charging violation of section 2 of said act will not be dismissed on appeal by reason of it not appearing from the information that there had been a notice and hearing, as provided by section 4 of the act, before the Secretary of Agriculture, where no motion to dismiss for this reason was made in the court below and the question was not raised by any pleading or assignment of error. *Frank et al. v. United States*.....

490

An information charging violation of section 2 of the act held insufficient in that it failed to allege that the defendant had been notified and afforded an opportunity to be heard by the Department of Agriculture prior to instituting the proceeding. *United States v. J. L. Hopkins & Co.*.....

528

Where an indictment or information is filed by the United States charging violation of section 2 of the act, it is not incumbent upon the Government either to allege or prove compliance by the administrative officers with the provisions of section 4 of the act, whether the hearing therein prescribed has or has not taken place. *United States v. Schraubstadter et al.*.....

393

United States v. Morgan et al......

494

It is not a condition precedent to prosecution for violation of the act that an investigation or hearing be had in the Department of Agriculture. Where a statute provides for notice in one case and permits prosecution without notice in another case, it shows that there was no intent to make notice jurisdictional. *United States v. Morgan et al.*.....

494

In seizure proceedings under section 10 of the act it is incumbent upon the Government to allege in its libel and prove that notice has been given to the party from whom the sample was taken and that he has been given an opportunity to be heard, pursuant to the provisions of section 4 of the act. *United States v. 3 Barrels of Vanilla Tonka and Compound*.....

356

In all proceedings for violations of the act instituted by officials of the United States Department of Agriculture, whether in personam or in rem, it is a condition precedent to prosecution that the notice provided for in section 4 of the act be given to the person from whom the samples were taken and such person should be afforded an opportunity to be heard.

United States v. 74 Cases of Grape Juice.....

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United States v. 74 Cases (or 20 Cases) of Grape Juice.....

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United States v. Certain Cases of Syrup.....

490

In seizure proceedings by the United States under section 10 of the act, it is unnecessary that notice be given to the person from whom the sample was obtained, or that such person be afforded an opportunity to be heard, in accordance with the provisions of section 4 of the act. *United States v. 75 Barrels of Vinegar*.....

497

United States v. 50 Barrels of Whisky.....

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United States v. 75 Boxes of Alleged Pepper.....

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United States v. 65 Casks of Liquid Extracts.....

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United States v. 9 Barrels of Olives.....

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United States v. 100 Barrels of Vinegar.....

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United States v. 100 Cases of Tepee Apples et al......

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OAT FEED.

See *Corno Horse and Mule Feed*.

OATHS.

See *Affidavits; Information*.

OBJECT OF THE ACT.

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The object of the law is apparent; that is, the public shall be put distinctly on notice, and cocaine, among other things mentioned in the act, in any preparation of food or drink, must be stated on the label, and it is immaterial also if it is a small quantity, if it is an appreciable quantity. *United States v. Koca Nola Co.*----- 213

The plain and manifest object of the statute is to protect the purchaser and consumer of drugs and food stuffs from fraud and imposition. *United States v. 68 Cases of Syrup*----- 216

The object of the act is to protect the public from deceit or injury. Its object is (1) to prevent deceit and false pretenses in the sale of foods and drugs; (2) to safeguard the public health. *French Silver Dragée Co. v. United States*----- 276

The object of the act is not only to protect the public from unwholesome food and drink, but to require that any article of food, drink, or medicine sold shall be correctly described by its label. *United States v. Morgan et al.*----- 300

The act has two clearly separate objects: First, to keep adulterated articles completely out of the channels of interstate commerce; and, second, if they enter such channels, to condemn them in transit or in original or unbroken packages after reaching their destination. *Hipolite Egg Co. v. United States*----- 378

It is the duty of the court to give the act a fair and reasonable construction for the accomplishment of its object. That object is the exclusion from interstate commerce of food products so adulterated as to endanger health. *United States v. 1,950 Boxes of Macaroni*----- 267

The act is intended to safeguard the people in their daily lives, and to the end that their health may be conserved. *United States v. Gidden*----- 522

The object of the Food and Drugs Act is to prevent the misuse of the facilities of interstate commerce in conveying to and placing before the consumer an adulterated article of medicine or food, and in order that its protection may be afforded to those who are intended to secure its benefits, the brands regulated must be on the packages intended to reach the purchaser. *McDermott et al. v. Wisconsin*----- 629

See Purpose of the act.

OFFAL.

The charge in a libel for the seizure of tomato catsup, that the product was made from "offal" of tomato-canning factories, does not charge violation of paragraph 6, section 7, of the act, that the product consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, the word "offal" as used in the libel being of no exact significance. *United States v. 650 Cases of Tomato Catsup*----- 183

See Tomato Catsup.

OIL CASSIA.

A drug labeled "Oil Cassia, U. S. P.," which contained rosin, held adulterated and misbranded. *United States v. Lehn & Fink*----- 579

OIL, COTTONSEED.

See Oil, Salad.

OIL, OLIVE.

See Oil, Salad.

OIL, SALAD.

An article labeled in large type "Olio Sopraffino Savoia Brand Salad Oil," and in small type "A compound of winter pressed cottonseed oil flavored with pure Italian olive oil," held misbranded in that the label represented the article to be superfine Italian olive oil, when in fact it was composed principally of cottonseed oil. *United States v. Italian Importing Co.*----- 340

OIL, SALAD—Continued.

Page.

Evidence held insufficient to warrant a finding that sesame oil, delivered for shipment in interstate commerce under the label "Imported Salad Oil," was misbranded within the meaning of the act. Held to be error on the part of the trial court in refusing to admit evidence to show that the term "salad oil" had acquired a trade meaning not synonymous with "olive oil." *Von Bremen et al. v. United States*-----

500

An article labeled "Olio per Insalata Vival Brand Soprafino Cotton Salad Oil Extra Qualita," and composed of cottonseed oil, held misbranded in that it was so labeled as to convey the impression that it was a superfine olive oil produced in Italy, when not so. *Brina v. United States*-----

259

An article labeled "Imported Salad Oil Morel Brand" held misbranded because it was not composed of olive oil, but was sesame oil. *United States v. Von Bremen et al.*-----

347

Reversed, *Von Bremen et al. v. United States*-----

500

The term "salad oil" prima facie means olive oil. *Brina v. United States*-----

259

United States v. Italian Importing Co.-----

340

United States v. Von Bremen et al.-----

347

See Judicial Notice.

OLIVES.

Olives held adulterated within the meaning of the act in that they consisted in whole or in part of a filthy and decomposed vegetable substance. *United States v. 10 Barrels of Olives*-----

280

See Filthy, Decomposed, and Putrid.

ORANGE EXTRACT OR FLAVORING.

An article labeled "Orange Flavoring" is not shown to be misbranded by an allegation in an information to the effect that it contained "only about 20 per cent of the amount of orange oil that should be present in orange extract." If there is a trade meaning to the words "orange flavoring" and "orange extract" which is that they should be identical in strength, such trade meaning should be pleaded. *United States v. Union Pacific Tea Co.*-----

350

ORIGINAL PACKAGE.

While the Government can seize only the original package, yet it may open the package and, if it finds anything written on the inside of the package which does not appear on the outside, that is, any misbranding or false statement, it has as much right to proceed as it has when the label is on the outside of the package seized; but, if it does not seize the original package before it is opened, then it has no right whatever to do anything more than to prosecute any party who may deliver the goods or receive the goods in a criminal case. *United States v. 300 Cases of Mapleine*-----

190

Where an adulterated or misbranded drug had been transported in interstate commerce and received by the consignee, who was the owner, and the packages were opened and samples taken, that the strength, quality, and purity might be tested, held that such opening for the purpose of testing did not constitute a breaking of the original package. *United States v. 5 Boxes of Asafetida*-----

318

United States v. 9 Boxes of Asafetida-----

323

Change of the original package might not constitute a change of the identity of a food or drug guaranteed by the manufacturer under the provisions of section 9 of the act. *United States v. Mayfield et al.*-----

244

See Interstate Commerce; Jurisdiction; Original Unbroken Packages.

ORIGINAL UNBROKEN PACKAGE.

Where a product in casks is shipped in interstate commerce in car-load lots, the cask and not the car is the original package within the meaning of section 10 of the act, which authorizes the seizure and forfeiture for adulteration or misbranding of articles so shipped while remaining in the original unbroken package. *United States v. 65 Casks of Liquid Extracts*-----

199

ORIGINAL UNBROKEN PACKAGE—Continued.

Page.

For the purpose of seizure under section 10 of the act of an adulterated article of food which has been transported in interstate commerce, the jurisdiction of the Federal Government continues while the food remains in the original unbroken packages at the point of destination even though mingled with the goods of the State. *United States v. 2 Barrels of Desiccated Eggs*-----

388

Hipolite Egg Co. v. United States-----

378

By the Food and Drugs Act, adulterated articles, while in interstate commerce, are made culpable as well as their shipper; while in original unbroken packages they can be seized and they carry their own identification as contraband of law; they are subject to the power of Congress to regulate, and they are not beyond the jurisdiction of the National Government because within the borders of a State. *Hipolite Egg Co. v. United States*-----

378

See Jurisdiction; Original Package; Package.

OYSTERS.

Canned oysters containing 10.5 per cent oysters and 89.5 per cent liquor, labeled "Cove Oysters. First Quality," held not adulterated or misbranded on account of the excessive amount of liquor present. *United States v. Potter*-----

576

An information charging that certain oysters in the shell were adulterated in that they "consisted in part of filthy, decomposed, and putrid animal and vegetable substance," held to state an offense under the act. *United States v. Sprague & Co.*-----

665

PACKAGE.

The words "package" and "original unbroken package" are both used in the act. The word "package" is not used in the same sense as "original unbroken package." The framers of the act manifestly had in mind the definition heretofore given by the courts to the term "original package," and in the second, third, and tenth sections have used that expression or its equivalent. The word "package" as used in the act means the package made up by the manufacturer for sale to the ultimate consumer which goes into the possession of the person who will use the article of food or drug. *United States v. The Dr. J. L. Stephens Co.*-----

466

The Dr. J. L. Stephens Co. v. United States-----

628

That the word "package" or its equivalent expression, as used by Congress in sections 7 and 8 of the act, in defining what shall constitute adulteration and what shall constitute misbranding within the meaning of the act, clearly refers to the immediate container of the article which is intended for consumption by the public, there can be no question. Limiting the requirements of the act as to adulteration and misbranding simply to the outside wrapping or box containing the packages intended to be purchased by the consumer, so that the importer, by removing and destroying such covering, could prevent the operation of the law on the imported article yet unsold, would render the act nugatory and its provisions wholly inadequate to accomplish the purpose for which it was passed. *McDermott et al. v. Wisconsin*-----

629

See Original Unbroken Package.

PATENT FLOUR.

See Standards of Purity.

PENAL STATUTE.

See Burden of Proof; Crimes, Infamous; Criminal Cases; Reasonable Doubt.

PENALTIES.

The word "penalties" as used in section 7 of the act is enlightening as showing that the requirements of section 4 do not apply to seizure proceedings under section 10. *United States v. 100 Barrels of Vinegar*-----

448

PEPPER.

Page.

An article labeled "Perfection Mills Compound White Pepper," which was composed of 65 per cent white pepper and 35 per cent corn product, with a statement of the ingredients in small and inconspicuous type on the label, held adulterated and misbranded. *Frank et al. v. United States*----- 490

A product composed of long pepper and black pepper, labeled "Pure Pepper," held misbranded; it was a *blend* and should have been labeled as such. *United States v. 75 Boxes of Alleged Pepper*--- 502
See Blend; Compound.

PEROXIDE CREAM.

An article labeled "Peroxide Cream," which contained very little, if any, peroxide, held not misbranded within the meaning of the act, there being no duty on the manufacturer to set forth the amount of peroxide contained in the article. *United States v. American Druggists' Syndicate*----- 406

PETTY OFFENSES.

A prosecution under section 2 of the act, which provides for no imprisonment for the first offense, but merely for a fine not exceeding \$200, is for a "petty offense," and the trial of such a case under waiver of jury would amount to an arbitration as to the questions of fact involved, and the trial court's conclusions of fact could not be reviewed in the appellate court. *Frank et al. v. United States*----- 490
See Appeals and Error; Crimes, Infamous; Information; Jury Trials.

PHARMACOPŒIA.

Congress, in providing that a product shall be deemed to be adulterated if it fails to comply with the test laid down in the United States Pharmacopœia or National Formulary official at the time of investigation, did not delegate legislative power but merely prescribed the method of ascertaining facts upon which the operation of the statute was to depend. *United States v. Lehn & Fink*----- 384
See Constitutionality; Ex Post Facto Legislation.

PHYSICIANS' PRESCRIPTIONS.

The act makes no exception in favor of the prescriptions of regularly licensed physicians, and such prescriptions are subject to the same regulations as other drugs relative to adulteration and misbranding. *United States v. The Dr. J. L. Stephens Co*----- 466
A physician's prescription sent through the channels of interstate commerce by a corporation is subject to the provisions of the act. *The Dr. J. L. Stephens Co. v. United States*----- 628

PLEADING.

See Indictment; Information; Libel.

POISONOUS INGREDIENTS.

See Added Poisonous and Added Deleterious Ingredients.

POLICE COURT, DISTRICT OF COLUMBIA.

The Police Court of the District of Columbia is a "proper court of the United States" within the meaning of section 5 of the act, which requires United States attorneys to whom violations of the act are reported "to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States" for the enforcement of the penalties provided by the act. *Huyler's v. Houston*--- 694

POLICE POWERS OF STATES.

See Constitutionality.

POLICE REGULATIONS.

The Food and Drugs Act is a police regulation. *United States v. The Piso Co*----- 484
United States v. Dade----- 554
See Knowledge and Intent.

POMEGRANATE.

See Grenadine Syrup.

PRESERVED WHOLE EGG.

See Eggs, Preserved Whole.

PRESUMPTION OF INNOCENCE.

See Burden of Proof; Reasonable Doubt.

PRIOR CONVICTION.

In prosecutions for violations of the act, it is improper to allow proof of a previous conviction for violation of the act to go before the jury. *United States v. Weeks*-----

643

PRIOR EXECUTIVE SEIZURE.

See Seizure.

PROOF.

See Burden of Proof.

PUDDING.

See Fruit Pudding.

PUMPKIN.

The addition of pumpkin to tomato catsup held to constitute adulteration. Such a mixture is misbranded if labeled "Compound Catsup." *William Henning & Co. v. United States*-----

506

PURCHASER.

The word "purchaser" as used in section 8 of the act is without limitation or qualifying terms. If it be broad enough to include wholesale and retail purchasers, it is also broad enough to include the ultimate consumer as a purchaser, and the labeling or branding of the product, package, box, bottle, or other container inclosing the article which he buys must be such as not to deceive or mislead him. *United States v. The Dr. J. L. Stephens Co.*-----

466

The Dr. J. L. Stephens Co. v. United States-----

628

See Package.

PURPOSE OF THE ACT.

This act was originally passed so as to prevent people from taking cocaine when they did not know there was cocaine in the mixture; or chloroform when they did not know there was chloroform in it or some of the other deleterious substances mentioned in the act. It was intended that, through the instrumentality of the act, food and drugs that pass into interstate commerce should be unadulterated, and should be branded truthfully. *United States v. The Piso Co.*-----

484

The purpose of this act is to conserve the public health by preventing interstate commerce in poisonous or deleterious food and drugs, and, in order that this may be effected, it is not only made a misdemeanor under the act, but the article of food or drug adulterated or misbranded is declared to be forfeited as an offending thing which threatens the health of the citizen. *United States v. 5 Boxes of Asafetida*-----

318

The purpose of the act is to prevent deceit and false pretenses in the sale of foods and drugs, and to protect the public. It is aimed at imitations, shams, frauds, and pretenses of every character as regards articles of food and drugs. Its purpose is to apprise people who buy and use drugs as to what they buy and use and to check the use of drugs which lead to destructive habits. Its primary purpose is the protection of the ultimate consumer—the purchasing public. *United States v. The Dr. J. L. Stephens Co.*-----

466

The purpose of the act is to protect the people against impure food, where the quantity or quality or value of a food is so adulterated as to reduce the food value. The whole purpose of the law is to have the quality of an article, as well as the quantity, just as described upon the label. *United States v. Potter*-----

576

PURPOSE OF THE ACT—Continued.

Page.

The purpose of Congress in the enactment of the act was the better protection of the people of the United States from adulterated or deleterious foods, drugs, medicines, and liquors. *Wm. M. Galt & Co. v. United States*.....

588

The purpose of the act is to prevent deceit and false pretenses in the sale of food or drugs and to safeguard the public health. *United States v. Bettman-Johnson Co.*.....

460

The purpose of the act is to protect the consumer in his right to receive what he orders and desires to receive. *United States v. Hall-Baker Grain Co.*.....

452

This statute was enacted for the purpose of benefiting and protecting the consumer. *United States v. 625 Sacks of Flour*.....

285

United States v. 100 Cases of Tepee Apples.....

172

The statute upon its face shows that the primary purpose of Congress was to prevent injury to the public health by the sale and transportation in interstate commerce of misbranded or adulterated foods. The legislation, as against misbranding, intended to make it possible that the consumer should know that an article purchased was what it purported to be. As against adulteration, the statute was intended to protect the public health from possible injury by adding to articles of food poisonous and deleterious substances which might render such articles injurious to the health of the consumer. *United States v. Lexington Mill & Elevator Co.*.....

701

The purpose of the act, so far as branding and labeling of articles of food is concerned, is to put the public on notice that it contains in it certain ingredients which the lawmakers believe the public should know before purchasing. *United States v. The Koca Nola Co.*.....

213

The law requires the manufacturer to be honest in his statement of the contents of the package; it requires him to be honest in stating the truth upon the label put upon it. That is what the act is intended to accomplish, and, if properly enforced, it will accomplish. *United States v. Edward Westen Tea & Spice Co.*.....

222

The title of the act itself, when carefully read and considered, demonstrates the fact that the sole purpose of its enactment was first, to protect purchasers from injurious deceptions by the sale of inferior for superior articles; and, second, to protect the health of the people by preventing the sale of normally wholesome articles to which have been added substances poisonous or detrimental to health. *Hall-Baker Grain Co. v. United States*.....

557

The general purpose and intent of the act must be deemed to be the prevention of fraud and deception, so that the purchaser can get the thing he has a right to suppose he is getting, rather than the protection of the public health to the extent of preventing the purchaser from deliberately and intentionally buying a particular food which is what it purports to be, even though a jury might think it "deleterious." *United States v. 40 Barrels and 20 Kegs of Coca-Cola*.....

710

The purpose of the law is not to protect experts and scientific men alone who know the nature and value of food products, but to protect ordinary people—people without scientific knowledge or experience. *United States v. 300 Cases of Mapleine*.....

190

The purpose of the act is to protect the public against deception in the purchase of drugs by punishing adulteration and misbranding, as therein defined. *United States v. American Druggists Syndicate*.....

406

The purpose of the act is to conserve public health by preventing interstate commerce in poisonous or deleterious foods and drugs. *United States v. 5 Boxes of Asafetida*.....

318

Congress, by its enactment, intended to promote honesty and fair-dealing in trade, and secure to the public pure and wholesome food and drugs. *United States v. Buffalo Cold Storage Co.*.....

257

The purpose of the act was to protect consumers against impure and adulterated foods and drugs and also against the use of foods or drugs which do not show what they contain by the brands on the package. *United States v. Mayfield et al.*.....

244

PURPOSE OF THE ACT—Continued.

Page.

The underlying purpose of the act was to protect the public health against imposition upon the users of foods, drugs, and medicines which are adulterated, misbranded, poisonous, or deleterious. *United States v. Johnson*.....

238

The purpose of the act is to secure the purity of foods and drugs, and to inform purchasers of what they are buying. Its provisions are directed to that purpose and must be construed to effect it. *United States v. Antikamnia Chemical Co.*.....

684

The general purpose of the act is to prevent the sale under misleading terms of foods and drugs. *United States v. Dunham Manufacturing Co.*.....

602

The Food and Drugs Act was passed by Congress under its authority to exclude from interstate commerce impure and adulterated food and drugs and to forbid the facilities of such commerce being used to enable such articles to be transported through the country from their place of manufacture to the people who consume and use them, and it is in the light of the purpose and of the power exerted in its passage by Congress that this act must be considered and construed. *McDermott et al. v. United States*.....

629

See Construction, Rules of; Knowledge and Intent; Object of the Act.

PUTRID.

See Filthy, Decomposed, and Putrid.

QUALITY.

Where a label on an article is alleged to be misleading and to constitute misbranding within the meaning of the act the character of the substance bearing the label is not to be considered, even though it be superior to the article which the purchaser thought he was buying. The purchaser has the right to have the article which he desires and pays for. The whole question in controversy is as to the truthfulness of the label. *United States v. 58 Sacks and 70 Sacks of Corn Meal*.....

480

United States v. Von Bremen et al......

347

United States v. Hall-Baker Grain Co......

452

See Coffee; Corn Meal; Oil, Salad; Purpose of the Act; Wheat.

RADIO SULPHO.

Drug products labeled "Radio Sulpho" and "Radio Sulpho Brew" held misbranded in that the labels contained statements regarding their curative or therapeutic effect which were false and misleading. *United States v. Schuch*¹.....

364

See Curative Effect of Drugs; Misbranding.

REASONABLE DOUBT.

In order to convict a defendant for violation of sections 1 and 2 of the act the jury must be convinced of his guilt beyond a reasonable doubt. *United States v. Harper*.....

163

Prosecutions for violations of section 2 of the act are subject to the same rules of evidence as proceedings in other criminal cases and, in order to convict, the jury must be satisfied of the guilt of the accused beyond a reasonable doubt. *United States v. S. Gumpert & Co.*.....

335

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United States v. John A. Tolman & Co......

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¹ Decided prior to the enactment of the Sherley Amendment of Aug. 23, 1912.

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United States <i>v.</i> Hudson Mfg. Co.....	622
United States <i>v.</i> Weeks.....	643
United States <i>v.</i> Finlayson et al.....	672
In a prosecution under section 2 of the act for the misbranding of confectionery in such a manner as to make it appear to be a product produced in Italy, when not so, in order to convict, the jury must be satisfied beyond all reasonable doubt that a purchaser of a box of said confectionery, labeled as charged in the indictment, on reading the label, would at once conclude that the confectionery was manufactured in Italy. If there is any other construction to be placed on the label, the verdict should be for the defendant. United States <i>v.</i> Ghirardelli.....	563
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REGULATIONS.

Regulation 17 of the Rules and Regulations for the Enforcement of the Act, referred to by the court as having the force and effect of law. United States <i>v.</i> 779 Cases of Molasses.....	218
Regulations 19 (c) cited and upheld by the court. United States <i>v.</i> Thomson & Taylor Spice Co.....	553
An article labeled "Genuine Hollands Geneva Gin * * * Distilled by London Wine & Spirit Co., New York," held to comply with regulation 19 (c), and not misbranded. The rules and regulations made pursuant to the authority of section 3 of the act have the force and effect of law. United States <i>v.</i> Finlayson et al.....	672
An article labeled "Holland Gin," which was manufactured in the United States, and the name of the manufacturer and place of manufacture was stated on the label, held properly branded under regulation 19 (c). United States <i>v.</i> 5 Cases of Holland Gin.....	681
Regulation 28 (d) and (e) held not to be controlling on the court by way of construing the act, but as being a reasonable construction placed on the act by the executive authorities which the court might adopt if it saw proper. United States <i>v.</i> The Piso Co.....	484
Where the amount of morphine present in a drug varies it may not be sufficient compliance with Regulation 28 (d) to state the maximum amount present in all the bottles "as less than 4 per cent" as the variance might be too great in some bottles. United States <i>v.</i> The Richie Co.....	447
In so far as regulation 28 designates the several derivatives of the drugs enumerated in section 8 and the preparations containing the same, it is within the power conferred on the three Secretaries by section 3 of the act to make uniform rules and regulations for carrying out the provisions of the act. That part of the regulation which requires that the label should state the name of the parent substance from which the derivative is obtained is an amendment or addition to the act itself, and, therefore, beyond the powers of the executive authority. United States <i>v.</i> 100 Packages of Antikamnia Tablets.....	416
Reversed, United States <i>v.</i> Antikamnia Chemical Co.....	684
Regulation 28, in so far as it requires the name of the parent substances of the derivatives referred to in section 8 of the act, in case of drugs, paragraph 2, to be declared on the labels of medicines, as well as the trade name of the derivatives themselves, upheld as fulfilling the purpose of the law. The regulation can not be said to be an addition to the law. United States <i>v.</i> Antikamnia Chemical Co.....	684
See Acetanilid; Geographical Name.	

REMEDIAL STATUTE.

Page.

The Food and Drugs Act, while containing penal provisions without which it could not be enforced, was enacted to remedy the great mischief resulting from the unrestricted sale of adulterated drugs and articles of food and ought to be given, where possible, a construction that will effect the general legislative intent. *United States v. 100 Packages of Antikamnia Tablets*-----

416

The act is essentially a remedial statute for the correction of known or supposed abuses with respect to the adulteration of food and other articles of human consumption. It is primarily a statute of prevention. Its meaning is made clear when its purpose is known and borne in mind. *United States v. 625 Sacks of Flour*-----

285

The act is essentially remedial and its evident purpose is not to be defeated by any narrowness of construction. *Lexington Mill & Elevator Co. v. United States*-----

604

The act was passed by Congress to remedy a preexisting evil. The evil produced by adulterated or misbranded articles of food and drugs could never be overestimated, and hence, the evil that Congress designed to remove and obliterate and eradicate was an important one and touching the welfare and comfort of the people. *United States v. Hobart*-----

328

See Construction, Rules of.

REMEDY.

The word "remedy" in its ordinary sense means that which cures disease—any medicine or application which puts an end to disease and restores health. *United States v. Schuch*-----

364

See Curative Effect of Drugs.

ROSE VANILLA.

See Distinctive Name.

ROSIN.

An adulterant of oil of cassia. *United States v. Lehn & Fink*-----

579

RUSK.

An information alleging that an article labeled "Genuine Dutch Tea Rusk Made in Holland, Mich., by the Michigan Tea Rusk Co., Holland, Mich.," with the word "Holland" printed in much larger type than the word "Mich.," dismissed by the court on the ground that it presented a doubtful case of misbranding as purporting to be a foreign product when not so. *United States v. Schurman et al*-----

249

See Information.

SALAD OIL.

See Oil, Salad.

SALE.

Libel for the seizure of an adulterated article of food for condemnation and forfeiture under section 10 of the act held fatally defective for failure to allege that the article seized had been transported in interstate commerce *for sale*. *United States v. 46 Packages and Bags of Sugar*-----

324

But see *Hipolite Egg Co. v. United States*-----

378

Libel for the seizure, condemnation and forfeiture of a drug product under the provisions of section 10 of the act, which had been shipped from the manufacturing agent in one State to the owner in another State for bottling and labeling, dismissed on the ground that said product was not shipped *for sale*. *United States v. 65 Casks of Liquid Extracts*-----

199

In proceeding under section 10 of the act for the seizure, condemnation and destruction of an article of food alleged to be adulterated, libel dismissed because evidence of libelant did not show that the article was shipped *for sale*. *United States v. 3 Barrels of vanilla Tonka and Compound*-----

356

A libel filed under section 10 of the act held not to be fatally defective for failure to allege that the article proceeded against had been transported in interstate commerce *for sale*. *United States v. 300 Cans of Frozen Eggs*-----

444

SALE—Continued.

Page.

Where adulterated vinegar, which had been shipped in interstate commerce, was seized while stored in the original unbroken packages, it was held immaterial that the evidence showed that the article had been shipped in interstate commerce for consumption and not *for sale* in such unbroken packages. *United States v. 100 Barrels of Vinegar*-----

448

Where adulterated eggs had been shipped from one State to another, to be used solely as raw material in the manufacture of some other article and not *for sale*, held that such eggs were subject to seizure by way of libel as provided in section 10 of the act. *United States v. 50 Cans of Preserved Whole Eggs*-----

227

Affirmed, *Hipolite Egg Co. v. United States*-----

378

Where an article of food had been shipped by the owner in one State to himself in another State for the purpose of testing the same, held that such article was subject to seizure for adulteration by way of libel as provided in section 10 of the act, and it was immaterial that such adulterated article had not been shipped *for sale*. *Philadelphia Pickling Co. v. United States*-----

612

Where a physician furnished a drug as part of his treatment of a patient, shipping said drug in interstate commerce, and made no separate charge for the drug, held that the sale of the physician's service included a *sale* of the drug. *United States v. The Dr. J. L. Stephens Co*-----

466

Affirmed, *The Dr. J. L. Stephens Co. v. United States*-----

628

In view of the decision of the Supreme Court in *Hipolite Egg Co. v. United States*, it is unnecessary to allege in libels for condemnation under the act that articles of food have been transported *for sale*. Nor is it material that consignees of seized articles of food do not intend to sell them but to use them for manufacturing purposes. *United States v. 2 Barrels of Desiccated Eggs*-----

388

See Libel; Shipment.

SAMPLES.

Where a representative sample of a commodity has been examined and found misbranded, the jury is authorized to infer from the proof as to the contents of the specific receptacle examined and analyzed, that all the receptacles from the same original packages contained the same ingredients as the sample and were the same commodity. *United States v. John A. Tolman & Co*-----

231

Where only a few sacks of flour taken from a pile of 400 sacks were examined and found adulterated, and the samples so examined were representative samples taken from various parts of the pile, held to be proper to assume, in the absence of satisfactory evidence to the contrary, that all the sacks were adulterated. *United States v. 350 Sacks of "Princess" Flour and 50 Sacks of "Fancy Melba" Flour*--

513

Affirmed, *Wm. M. Galt & Co. v. United States*-----

588

Whether a sample is fairly representative of the whole shipment is a preliminary question to be decided by the trial court and the decision thus reached will not be reversed in the appellate court, unless the facts producing it are before that court—and then only when error clearly appears. It is proper to assume that, if the samples were not representative of the lot, the appellants would have offered testimony to that effect at the trial of the case. *Wm. M. Galt & Co. v. United States*-----

588

Inspection laws of Kentucky properly provide for the taking of so much of an article covered by them as is necessary for analysis in order to determine its true nature. *Savage v. Scovell*-----

170

See Affidavits; Analysis.

SECRETARY OF AGRICULTURE.

See Mandamus.

SEIZURE.

Page.

To render a drug subject to seizure for condemnation and forfeiture under section 10 of the act, it must be adulterated or misbranded when seized. It is immaterial that the drug was adulterated or misbranded when shipped. It can not be seized if the adulteration or misbranding has been corrected after its receipt in interstate commerce by the consignee and prior to seizure. *United States v. 5 Boxes of Asafoetida*-----

318

Under section 10 of the act, providing for the seizure by way of libel for the condemnation and forfeiture of adulterated or misbranded foods and drugs, such seizures can not be made except by authorized officials. There is no authority for the seizure of such articles by private persons. *United States v. 2 Barrels of Desiccated Eggs*-----

388

Section 10 of the act, providing that the procedure in seizing cases shall conform as near as may be to proceedings in admiralty, does not render such proceedings within the admiralty or maritime jurisdiction in the Federal courts; the jurisdiction in such proceedings being conferred by the act itself. (*Ibid.*)

Under Revised Statutes, section 563, subdivision 8 (U. S. Comp. Stat., 1901, p. 467), giving the United States district courts jurisdiction of all civil cases in admiralty and maritime jurisdiction, the court, in seizures under section 10 of the Food and Drugs Act, and on land, proceeds not as a court of admiralty, but as a court of common law jurisdiction on a trial by jury. *United States v. Geo. Spraul & Co.*-----

372

Seizures under section 10, and on land, are in the district courts proceedings at common law, and are reviewable only as provided by the rules of common law. Review must be by writ of error. The circuit courts of appeals have no jurisdiction to entertain an appeal in such cases. *Hudson Manufacturing Co. v. United States*-----

506

United States v. 779 Cases of Molasses-----

218

United States v. 3 Barrels of Vanilla Tonka and Compound-----

586

443 Cans of Frozen Egg Product v. United States-----

582

On a warrant for the seizure of 65 casks of a drug product, a lesser number may be seized. *United States v. 65 Casks of Liquid Extracts*-----

199

In order to give the court jurisdiction over the subject matter in proceedings instituted under section 10 of the act, held to be necessary that the thing proceeded against be seized prior to the filing of the libel of information. *United States v. 8 Packages or Casks of Drug Products*-----

305

United States v. 275 Barrels of Tomato Catsup-----

297

Contra, United States v. George Spraul & Co.-----

372

Prior executive seizure of an article proceeded against under section 10 of the act held to be unnecessary to confer jurisdiction over adulterated or misbranded foods and drugs. The language of the act indicates that the procedure by way of libel should be commenced in the district courts before the property is seized. *United States v. 2 Barrels of Desiccated Eggs*-----

388

United States v. George Spraul & Co.-----

372

United States v. 100 Barrels of Vinegar-----

448

Preliminary examination by the Department of Agriculture and the hearings provided for by section 4 of the act are not necessary conditions precedent to the maintenance of a libel for condemnation and forfeiture of adulterated or misbranded articles of food and drugs under section 10 of the act.

United States v. 9 Barrels of Olives-----

284

United States v. 50 Barrels of Whisky-----

174

United States v. 65 Casks of Liquid Extracts-----

199

United States v. Knowlton Danderine Co.-----

243

United States v. 100 Barrels of Vinegar-----

448

See Admiralty; Appeal and error; Jurisdiction; Libel; Notice and Opportunity to be Heard; Sale.

SENNA, ALEXANDRIA.

Page.

A drug product labeled "Alex. Senna, U. S. P." held not adulterated or misbranded by reason of containing seeds, stalks, and pebbles, and other foreign substances, and through failure to comply with the requirements of the U. S. Pharmacopœia.

United States v. J. L. Hopkins & Co----- 528

SHIPMENT.

The "shipment" referred to in section 2 of the act should not be construed to mean "shipment for sale." Its meaning in this connection covers any shipment for any purpose in the course of commerce. Philadelphia Pickling Co. v. United States-----

612

The fact that frozen eggs, against which seizure proceedings were instituted under section 10 of the act, had been shipped from one State to another and consigned from the shipper to itself, did not indicate that they had not been transported in interstate commerce.

United States v. 300 Cans of Frozen Eggs----- 444

Held that it is not an interstate shipment within the meaning of section 10 of the act where a product is shipped from the manufacturing agent in one State to its owner in another State, because such product is not shipped "for sale." United States v. 65 Casks of Liquid Extracts-----

199

The prohibition in the act against the interstate shipment of adulterated food and drugs applies to shipments by warehousemen as well as manufacturers and dealers. United States v. Buffalo Cold Storage Co-----

257

It is an interstate shipment where an article is consigned through the United States mail to a person outside of the State. The mere fact that the negotiations were carried on by mail and the article deposited by the shipper in the post office at the point of origin of the shipment did not make the transaction an intrastate one. United States v. Tucker-----

404

See Interstate Commerce; Sale.

SHORT MEASURE.

It is no defense to a prosecution for misbranding as to the measure of the contents of a can of syrup that the short measure was caused by filling the cans while the syrup was hot and that the shortage was due to shrinkage which occurred when the syrup cooled. If the syrup was short measure when shipped, it was misbranded. United States v. Scudder Syrup Co-----

619

SHRED COCOANUT.

An article labeled and sold as "Shred Cocoanut" held misbranded by reason of its containing glycerine and sugar, the presence of which substances was not declared on the label. United States v. Dunham Manufacturing Co-----

602

SILVER DRAGEES.

See Confectionery.

SILVER, METALLIC.

See Confectionery.

SPECIFIC FOR ASTHMA.

A drug product labeled "Specific for Asthma" held misbranded within the meaning of the act for the reason that it contained cocaine, the quantity or proportion of which was not declared on the label. United States v. Tucker-----

404

STANDARDS OF PURITY.

The standards of purity for food products, established by the Secretary of Agriculture by authority of the act of March 3, 1903, and published in Circular No. 19 of the United States Department of Agriculture, governs in determining what constitutes adulteration of such products under the act. United States v. Frank et al-----

360

Contra, United States v. St. Louis Coffee & Spice Mills-----

196

STANDARDS OF PURITY—Continued.

Page.

The act of June 30, 1906, is not unconstitutional for indefiniteness or uncertainty on account of the fact that it contains no standards of purity for food products. *Shawnee Milling Co. v. Temple et al.* 280

The act is not void for uncertainty or indefiniteness in that no standard of grade, quality, or purity is prescribed. The determination of standards is left to the courts, as the courts can well protect the rights of parties in each particular case by requiring specific and properly drawn pleadings. *United States v. 420 Sacks of Flour* 250

In the absence of a standard for lithia water, it is reasonable to suppose that such water should contain at least a weighable amount of lithium in a potable quantity of water. Water containing only 1 grain of lithium in 10,000 gallons of water is misbranded if labeled "lithia water." *United States v. 7 Cases of Buffalo Lithia Water* 697

Where ice cream was alleged to be adulterated because it contained only 7.09 per cent of milk fat, held that such article was not adulterated within the meaning of the act by reason of the fact that there is no standard for ice cream, and the court did not consider itself warranted by the evidence in fixing the minimum amount of fat at 14 per cent. *United States v. Rinchini* 479

In the absence of a uniform standard for patent flour, flour found to contain 90 per cent of the flour content of the wheat, held not adulterated or misbranded if labeled "Patent Flour." *Lexington Mill & Elevator Co. v. United States* 604

Affirmed, *United States v. Lexington Mill & Elevator Co.* 701

In a proceeding by way of libel for the condemnation and forfeiture of vinegar alleged to be adulterated the Government is not limited to the requirements laid down in the Standards of Purity for Food Products (Circular No. 19, U. S. Department of Agriculture) in showing the article to be adulterated. *United States v. 100 Barrels of Vinegar* 448

It is no defense to a prosecution for selling adulterated milk in the District of Columbia that there is no standard fixing the limits between pure and impure milk. The dividing line in each instance is a question of fact. *United States v. Dade* 554

It would be difficult, if not impossible, to fix an arbitrary standard for determining just what state a food must reach to render it "filthy, decomposed, or putrid" within the meaning of the act. In the absence of such a standard, each case must be determined on its merits. Where it appears that the article is so far decomposed as to render it unfit for food it comes within the letter and spirit of the law. *United States v. 200 Cases of Tomato Catsup* 706

Vanilla extract which failed to comply with the standard shown by the testimony of the Government's witnesses to be the true standard for vanilla extract as recognized by the trade and public, held adulterated and misbranded. *United States v. Hudson Mfg. Co.* 622

The act is not void for uncertainty and indefiniteness for failure to fix legal standards for various wines. *United States v. The Sweet Valley Wine Co.* 625

See Constitutionality; Ice Cream; Tomato Catsup; Vanilla Extract.

STARCH.

See Milk Chocolate.

STATE HEALTH OR FOOD OFFICERS.

The United States district attorney is authorized to prosecute violations of the act on report of State health or food officials, or on his own initiative, without alleging or proving that the provisions of section 4 of the act, relating to notice and hearings, have been complied with. *United States v. 74 Cases (or 20 Cases) of Grape Juice* 413

United States v. Morgan et al. 494

SUBSTITUTION.

In a prosecution for adulteration by substitution, it is unnecessary to prove that the substituted substance is poisonous or deleterious or injurious to health. It is sufficient within the meaning of the act if any substance not a component part of the original substance has been substituted. *United States v. Libby, McNeill & Libby* 673

SUGAR.

Page.

All sugars are "like substances," and the mixture of two or more sugars produces a blend within the meaning of the act. *United States v. 68 Cases of Syrup*-----

216

The introduction of sugar into a frozen egg product does not constitute adulteration of the egg product within the meaning of the act, where it is shown that the egg product was prepared according to the directions of the purchaser or under a patent. *United States v. 443 Cans of Frozen Egg Product*-----

351

Condensed skimmed milk, containing 42 per cent of cane sugar, the presence of which was not declared on the label, held adulterated and misbranded. *United States v. Libby, McNeill & Libby*-----

678

SYRUP, GRENADINE.

The term "Grenadine Syrup" does not necessarily denote an article containing Pomegranate juice. An article labeled "Grenadine Syrup" made from sugar, citric and tartaric acids, and the juice of certain fruits, held not adulterated or misbranded. *United States v. 80 Cases of Grenadine Syrup*-----

561

SYRUP.

An article labeled "Gold Leaf Syrup" with a design of a leaf of maple and sugar cane stalk, and the statement in plain and distinct type, "Composed of Maple and White Sugar," together with the name of the maker, held not misbranded, although the proportion of cane sugar exceeded the proportion of maple sugar present in the article. *In re Wilson*-----

186

An article labeled "Topmost Cane and Maple Syrup * * * Cane Sugar 60%, Maple Syrup 40% * * *," held misbranded because it contained little, if any, maple syrup. *United States v. John A. Tolman & Co.*-----

231

Certain cases seized by the United States under section 10 of the act, were labeled "Western Reserve Ohio Blended Maple Syrup * * *." The bottles contained in the cases were labeled "Western Reserve Ohio Blended Syrup, Western Reserve Syrup Co., Cleveland, O., Blenders of Fancy Maple Syrup and Maple Sugar," held that, construing all the words of the bottle label together, the same meaning was intended in the bottle labels as in the labels on the cases; viz., that the boxes and bottles contained a blended maple syrup, and that such article was not misbranded, although it was composed of cane syrup flavored with an extract made from maple wood. *United States v. 68 Cases of Syrup*-----

216

Syrup labeled "Western Reserve Ohio Blended Maple Syrup," and in small type "This syrup is made from the sugar maple tree and cane sugar," held misbranded, as the label would mislead purchasers into the belief that the article was composed in part of boiled down sap from live maple trees. *United States v. Scanlon*-----

181

See Blend; Information; Libel; Maple Syrup; Maplewood Extract; Object of the Act.

SYRUP, SCUDDER'S CANADA.

Misbranded as to measure. *United States v. Scudder Syrup Co.*---

619

TALC.

See Confectionery.

TEPEE APPLE.

See Apples.

THERAPEUTIC EFFECT OF DRUGS.

See Curative Effect of Drugs.

TIN, SALTS OF.

Salts of tin contained in canned tomatoes held to be an added poisonous ingredient, which might render such article injurious to health. *United States v. 2,000 Cases of Canned Tomatoes*-----

342

See Added Poisonous and Added Deleterious Ingredients.

TOMATO CATSUP.

Page.

Where tomato catsup contains pumpkin as a filler, it is not a sufficient compliance with the act to label it "Compound Catsup." It must be labeled, branded, or tagged so as to plainly indicate the substances composing the compound. *Wm. Henning & Co. v. United States*-----

506

A libel alleging that tomato catsup labeled "Made from choice ripe tomatoes, granulated sugar, selected high-grade spices, grain vinegar," was misbranded because it was actually made from "tomato pulp screened from the peelings and cores as the offal of tomato canning factories and not from choice ripe tomatoes," held not to set forth a prima facie case of misbranding, as it will not be assumed that, because peelings are not used in tomato canning plants, that they are unfit for use as food. *United States v. 650 Cases of Tomato Catsup*-----

183

Tomato catsup, containing large numbers of bacteria, yeasts, and spores, and shown to have been manufactured by insanitary methods, held adulterated in that it consisted in whole or in part of a filthy, decomposed, or putrid substance. *United States v. 200 Cases of Tomato Catsup*-----

706

See Compound; Filthy, Decomposed, and Putrid; Judicial Notice; Offal.

TOMATOES.

An article labeled "Perfection Brand Tomatoes" held adulterated and misbranded in that it was not entirely tomatoes, as labeled, but consisted wholly or in part of a filthy, decomposed, and putrid vegetable substance; and also contained an added poisonous ingredient, to wit, salts of tin, which might render the article injurious to health. *United States v. 2,000 Cases of Canned Tomatoes*-----

342

See Added Poisonous and Added Deleterious Ingredients; Tin, Salts of.

TRADE-MARK.

The filing of a trade-mark for an article of food or drugs does not give the manufacturer a right to put a false statement upon the label of a manufactured article. The fact that the name of an article is a registered trade-mark affords no defense to a prosecution for misbranding on account of false or misleading statements on the article. *United States v. American Chicle Co.*-----

524

See Beeman's Pepsin Chewing Gum; Distinctive Name.

TURPITUDE.

See Knowledge and Intent.

UNFIT FOR FOOD.

The act does not use the words "Unfit for food," but when it describes an adulterated article as one which is "decomposed and filthy" it means undoubtedly unfit for food to the extent that it would be improper and unfit food for a person to indulge in. *United States v. 3,000 Pounds of Frozen Eggs*-----

353

Where it was alleged in a libel that an article was "filthy, decomposed, and putrid and unfit for food," held that it was sufficient that the article be shown to be filthy, decomposed, or putrid, and it was unnecessary to prove the allegation that it was "unfit for food." *United States v. 275 Cases of Tomato Catsup*-----

297

When it appears that an article of food is so far decomposed as to render it unfit for food it comes within the letter and spirit of the law, which condemns, as adulterated, foods which consist in whole or in part of a "filthy, decomposed, or putrid animal or vegetable substance." *United States v. 200 Cases of Tomato Catsup*-----

706

The condition of a product in the hands of the consumer is the place and time to test its fitness for food. *United States v. 443 Cans of Frozen Egg Product*-----

507

See Filthy, Decomposed, and Putrid; Libel.

UNSOLD.

Page.

After transportation in interstate commerce of adulterated and misbranded goods it is enough to give the Government jurisdiction over them if the articles are unsold, whether in original packages or not. *McDermott et al. v. Wisconsin*-----

629

VANILLA EXTRACT OR FLAVOR.

An information charging that defendant sold in interstate commerce a liquid labeled "Flavor of Vanilla" which did not contain any extract of vanilla does not state a case of adulteration or misbranding of vanilla extract in violation of the act of June 30, 1906, the words "Extract" and "Flavor" not being synonymous terms. *United States v. St. Louis Coffee & Spice Mills*-----

196

But see *United States v. Edward Westen Tea & Spice Co.*-----

222

An article labeled "Prime Vanilla Extract, made from the extractive matter of prime vanilla beans, sweetened with cane sugar," which contained only 2 grams of vanilla beans to each 100 cc. of the extract, and which was artificially colored with caramel, and contained added vanillin, held adulterated and misbranded. *United States v. Hudson Mfg. Co.*-----

622

A flavoring substance, composed of vanillin, coumarin, and burnt sugar, labeled "Extract of Vanillin and Coumarin, Burnt Sugar Color," held adulterated in that it was colored in a manner whereby its inferiority was concealed, and misbranded in that it was an imitation of vanilla extract and was not labeled as an imitation; and further misbranded in that said article was a compound, and was not labeled so as to plainly indicate that it was a compound, and the word "compound" was not stated on the label. *United States v. McConnon & Co.*-----

654

Articles labeled "Extract of Vanilla" and "Ext. Vanilla" held misbranded because they were not true extract of vanilla, but were compounds of vanillin and coumarin artificially flavored and colored in a manner whereby inferiority was concealed. *United States v. S. Gumpert & Co.*-----

335

See *Lemon Extract or Flavor; Hudson's Extract; Information; Standards of Purity.*

VANILLIN.

Vanillin added to vanilla extract as such constitutes adulteration, and the resultant product is misbranded if labeled "Prime Vanilla Extract, made from the extractive matter of prime vanilla beans." *United States v. Hudson Mfg. Co.*-----

622

VENUE.

See *Affidavits.*

VERIFICATION.

See *Affidavits; Information; Libel.*

VINEGAR.

Distilled vinegar and boiled cider are unlike substances, and do not compose a blend within the meaning of the act. Held that a substance labeled "Saratoga Brand Vinegar, A Blend of Pure Boiled Apple Cider and Distilled Vinegar," which was composed of distilled vinegar and a small quantity of pure boiled apple cider, was misbranded, as leading the public to believe that the article was composed of pure boiled apple cider *vinegar* and distilled vinegar. *United States v. 10 Barrels of Vinegar*-----

410

An article labeled "Pure Cider Vinegar * * * Guaranteed Cider Vinegar * * *" held adulterated and misbranded for the reason that it was not pure cider vinegar, but consisted wholly or in part of distilled vinegar or dilute solution of acetic acid and a material high in reducing sugars and foreign mineral matter, which had been mixed and prepared in imitation of cider vinegar. *United States v. 75 Barrels of Vinegar*-----

497

VINEGAR—Continued.

Page.

In a libel proceeding for the condemnation and forfeiture of vinegar alleged to be adulterated, the Government, in its proof, is not limited to the tests and standards mentioned in Bulletin No. 65 and Circular No. 19 of the United States Department of Agriculture, nor to the methods of analyses adopted under regulation 4, but may make use of any accurate test. United States *v.* 100 Barrels of Vinegar.---

448

Where samples of alleged pure cider vinegar showed only from 0.11 per cent to 0.16 per cent glycerine, it was held not to be pure cider vinegar but an adulterated article. Evidence held to establish the accuracy of the glycerine test for the determination of pure cider vinegar. (Ibid.)

See Blend; Judicial Notice.

WAIVER OF JURY.

See Jury Trials.

WAREHOUSEMAN.

See Shipment.

WATER.

See Buffalo Lithia Water.

WATER-GROUND MEAL.

The term "water-ground" means ground by a mill using water power as a motive force applied directly to a water wheel, and does not allude to meal ground by electric power generated originally by water. United States *v.* 58 Sacks and 70 Sacks of Corn Meal.-----

434

See Corn Meal.

WATER, SPRING.

Croton water drawn from the pipes in New York City furnishing the ordinary city water supply, filtered and bottled after the addition of small quantities of mineral salts and carbonic-acid gas, is not spring water, as that term is generally understood; and the labeling of the bottles as "Imperial Spring Water" constitutes misbranding within the meaning of the act. United States *v.* Morgan et al.-----

300

WHEAT.

An article sold as "No. 2 Red Wheat" held adulterated and misbranded by reason of the fact that an inferior grade of wheat had been substituted for the article and had been mixed and packed with it so as to reduce, lower, or injuriously affect its quality and strength; and in that said article was offered for sale under the distinctive name of another article, to wit, No. 2 red wheat. United States *v.* Hall-Baker Grain Co.-----

452

Reversed, Hall-Baker Grain Co. *v.* United States.-----

557

WHISKY.

Bourbon whisky is a distillate of corn, made from a mixture of fermented grains, of which mixture corn forms the greatest part, and is distilled in certain localities, particularly in Kentucky. A product distilled at New Orleans, La., out of molasses, sulphuric acid, and water, and labeled "Bourbon Whisky," held misbranded. United States *v.* 50 Barrels of Whisky.-----

174

WINE.

The word "wine" is, by general acceptance and standard definition, understood to mean the fermented juice of the undried grape. United States *v.* The Sweet Valley Wine Co.-----

625

See Champagne; Extra Dry; Imitation Champagne.

WRIGHT'S CONDENSED SMOKE.

An article made by distilling wood, for curing meat, held not misbranded by the label "Wright's Condensed Smoke. A Liquid Smoke * * *," such name being a fanciful or descriptive name referring to the article, and not implying to the purchaser that the article was actually smoke in condensed, liquid form. United States *v.* Wright et al.-----

639

WRIT OF ERROR.

See Appeal and Error.

OPINIONS OF THE ATTORNEYS GENERAL.¹

IMPORTED MEAT AND MEAT FOOD PRODUCTS MAY BE ADMITTED INTO THE UNITED STATES, AND TRANSPORTED IN INTERSTATE COMMERCE, SUBJECT TO THE PROVISIONS OF THE FOOD AND DRUGS ACT, JUNE 30, 1906.²

[50]³ DEPARTMENT OF JUSTICE,
September 27, 1906.

SIR: In your communication of the 18th instant you ask to be advised whether the prohibition upon transportation contained in the following paragraph of what is known as the meat inspection amendment to the agricultural appropriation act approved June 30, 1906 (34 Stat. 669, 674, 676), applies to meat and meat food products imported from foreign countries:

That on and after October first, nineteen hundred and six, no person, firm or corporation shall transport or offer for transportation, and no carrier of interstate or foreign commerce shall transport or receive for transportation from one State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to any place under the jurisdiction of the United States, or to any foreign country, any carcasses or parts thereof, meat, or meat food products thereof which have not been inspected, examined, and marked as "inspected and passed," in accordance with the terms of this Act and with the rules [51] and regulations prescribed by the Secretary of Agriculture: *Provided*, That all meat and meat food products on hand on October first, nineteen hundred and six, at establishments where inspection has not been maintained, or which have been inspected under existing law, shall be examined and labeled under such rules and regulations as the Secretary of Agriculture shall prescribe, and then shall be allowed to be sold in interstate or foreign commerce.

This provision, on its face, prohibits the transportation in interstate commerce and to foreign countries of all carcasses, meat and meat food products which have not been inspected, examined and marked as required by the act; and as imported meat and meat food products cannot meet this test (no inspection being provided in the act for such articles), question you say has been made by importers, railroads and others as to whether they are not excluded from transportation in interstate commerce. Exclusion from transportation in interstate commerce would amount to a restriction upon importation, since trade in such articles would be confined to the State wherein the port of entry is situated.

In determining the meaning of the provision in question reference must be had to the amendment in its entirety and the circumstances

¹ For opinions of the Attorneys General, published in Food Inspection Decisions, see pp. 51, 86, 110, 113, 121, and 139, *ante*.

² 26 Op. Att. Gen. 50. See subsequent opinions of the Attorney General, dated Aug. 25, 1911 (29 Op. Att. Gen. 227), and Mar. 11, 1912 (29 Op. Att. Gen. 355); also opinion of May 24, 1913 (30 Op. Att. Gen. 164), p. 800, *post*.

³ Numbers in brackets refer to pages of bound volume of Opinions of Attorneys General.

which gave rise to this legislation. Considering the amendment as a whole in the light of such circumstances, I fail to perceive any support whatever for the suggestion that Congress intended thereby to prohibit the interstate or foreign transportation of meat and meat food products imported from foreign countries.

It is well known that the legislation in question was enacted by Congress immediately in response to the message of the President of June 4, 1906, transmitting the report of Messrs. Reynolds and Neill, who had been appointed by him to investigate the conditions in the Chicago stock yards and packing houses. (40 Cong. Rec., 7800.) In that message the President said:

The report shows that the stock yards and packing houses are not kept even reasonably clean, and that the method of handling and preparing food products is uncleanly and dangerous to health. Under existing law the National [52] Government has no power to enforce inspection of the many forms of prepared meat food products that are daily going from the packing houses into interstate commerce. Owing to an inadequate appropriation the Department of Agriculture is not even able to place inspectors in all establishments desiring them. The present law prohibits the shipment of uninspected meat to foreign countries, but there is no provision forbidding the shipment of uninspected meats in interstate commerce, and thus the avenues of interstate commerce are left open to traffic in diseased or spoiled meats. If, as has been alleged on seemingly good authority, further evils exist, such as the improper use of chemicals and dyes, the Government lacks power to remedy them. A law is needed which will enable the inspectors of the General Government to inspect and supervise from the hoof to the can the preparation of the meat food product. The evil seems to be much less in the sale of dressed carcasses than in the sale of canned and other prepared products; and very much less as regards products sent abroad than as regards those used at home.

* * * * *

I urge the immediate enactment into law of provisions which will enable the Department of Agriculture adequately to inspect the meat and meat food products entering into interstate commerce and to supervise the methods of preparing the same, and to prescribe the sanitary conditions under which the work shall be performed. I therefore commend to your favorable consideration and urge the enactment of substantially the provisions known as Senate amendment No. 29 to the act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1907, as passed by the Senate, this amendment being commonly known as the "Beveridge amendment."

The Beveridge amendment had been adopted by the Senate on May 25, 1906. (40 Cong. Rec., 7420.) On June 19, 1906, the House substituted for it an amendment recommended by the Committee on Agriculture (id. 8720), which subsequently became the law.

Both the Beveridge amendment and the House substitute had the same general object in view, namely, the inspection, [53] "from the hoof to the can," of all meats prepared in the slaughtering and packing establishments of this country for shipment in interstate or foreign commerce. In other words, it was the domestic product and not the foreign article that Congress had in mind.

The first paragraph of the amendment finally adopted provides:

That for the purpose of preventing the use in interstate or foreign commerce, as hereinafter provided, of meat and meat food products which are unsound, unhealthful, unwholesome, or otherwise unfit for human food, the Secretary of Agriculture, at his discretion, may cause to be made, by inspectors appointed for that purpose, an examination and inspection of all cattle, sheep, swine,* and goats before they shall be allowed to enter into any slaughtering, packing, meat-canning, rendering, or similar establishment, in which they are to be slaughtered and the meat and meat food products thereof are to be used in interstate or foreign commerce. * * *

Having thus provided for an ante-mortem examination, Congress, in the next paragraph provided that, "for the purposes hereinbefore set forth," the Secretary of Agriculture should cause to be made, by inspectors appointed for the purpose, "a post-mortem examination and inspection of the carcasses and parts thereof of all cattle, sheep, swine, and goats to be prepared for human consumption at any slaughtering, meat-canning, salting, packing, rendering, or similar establishment in any State, Territory, or the District of Columbia for transportation or sale as articles of interstate or foreign commerce," thus in terms indicating that domestic establishments, and hence the domestic product, were alone in view.

Provision is also made for the examination and inspection of all meat food products prepared for interstate or foreign commerce in said establishments, and the marking thereof as "Inspected and passed," or "Inspected and condemned," as circumstances may require.

It is further provided that "the Secretary of Agriculture shall cause an examination and inspection of all cattle, sheep, swine, and goats, and the food products thereof, slaughtered [54] and prepared *in the establishments hereinbefore described* for the purposes of interstate or foreign commerce to be made during the nighttime as well as during the daytime when the slaughtering of said cattle, sheep, swine, and goats or the preparation of said food products is conducted during the nighttime."

Then follows the paragraph in question, forbidding, on and after October 1, 1906, the transportation in interstate commerce or to foreign countries of carcasses, meat or meat food products which have not been inspected, examined, and marked as "Inspected and passed," in accordance with the terms of the act and the rules and regulations prescribed by the Secretary of Agriculture.

As the act provides only for the inspection of cattle and meat slaughtered or prepared in domestic establishments, this provision manifestly can have no application to cattle or meats slaughtered or prepared abroad and imported into this country.

The scope of the act is also indicated by this paragraph of the amendment, which occurs further on:

No person, firm, or corporation engaged in the interstate commerce of meat or meat food products shall transport or offer for transportation, sell or offer to sell any such meat or meat food products in any State or Territory, or in the District of Columbia, or any place under the jurisdiction of the United States, other than in the State or Territory or in the District of Columbia or any place under the jurisdiction of the United States in which the slaughtering, packing, canning, rendering, or other similar establishment owned, leased, operated by said firm, person, or corporation is located unless and until said person, firm or corporation shall have complied with all of the provisions of this act.

It is significant that this provision, which emphasizes the fact that domestic establishments, and hence the domestic product, were alone in the contemplation of Congress, immediately followed the provision under discussion in the Beveridge amendment. It was shifted about in the House substitute, which was based on the Beveridge amendment, but apparently without any intention of altering its meaning.

The House also added to the provision in question the [55] proviso as to meat and meat food products on hand on October 1, 1906, at establishments where inspection was not maintained or which were

inspected under existing law, which clearly has reference only to domestic establishments and their products.

The amendment also makes provision for the inspection of cattle, sheep, swine, and goats, and the carcasses and parts thereof, which, or the meat products of which, are intended or offered for export to foreign countries. But there is not in the entire amendment any reference to meat or meat products imported from foreign countries.

It is manifest, therefore, that Congress in this legislation was dealing entirely with domestic slaughtering and meat packing establishments and their products. The subject of imported meat food products was, however, under consideration by it at the same time in another connection. I refer to the Pure Food Law, also approved June 30, 1906. (34 Stat. 768.) That act forbids "the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or *from* any foreign country (it will be observed that the provision of the Meat Inspection Amendment in question only refers to transportation *to* any foreign country), or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded within the meaning of this act." Section 7 provides that for the purposes of the act an article shall be deemed to be adulterated (p. 770)—

In the case of food:

First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

Second. If any substance has been substituted wholly or in part for the article.

Third. If any valuable constituent of the article has been wholly or in part abstracted.

Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injuri[56]ous to health: *Provided*, That when in the preparation of food products for shipment they are preserved by any external application applied in such manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the covering or the package, the provisions of this act shall be construed as applying only when said products are ready for consumption.

Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter.

The act further provides (p. 772):

SEC. 11. The Secretary of the Treasury shall deliver to the Secretary of Agriculture, upon his request, from time to time, samples of foods and drugs which are being imported into the United States or offered for import, giving notice thereof to the owner or consignee, who may appear before the Secretary of Agriculture, and have the right to introduce testimony, and if it appear from the examination of such samples that any article of food or drug offered to be imported into the United States is adulterated or misbranded within the meaning of this act, or is otherwise dangerous to the health of the people of the United States, or is of a kind forbidden entry into, or forbidden to be sold or restricted in sale in the country in which it is made or from which it is exported, or is otherwise falsely labeled in any respect, the said article shall be refused admission, and the Secretary of the Treasury shall refuse delivery to the consignee and shall cause the destruction of any goods refused delivery which shall not be exported by the consignee within three months from the date of notice of such refusal under such regulations as the Secretary of the Treasury may prescribe. * * *

For several years past the agricultural appropriation acts have contained provisions similar to those of section 11.

If the meat inspection amendment were held to forbid the interstate transportation of imported meat and meat food [57] products it would conflict with the intention of Congress as manifested in the pure food law, which plainly contemplates the importation, transportation and delivery of such articles if pure and wholesome and not adulterated or misbranded within the meaning of the act. It is inconceivable that Congress, in two acts passed at the same time, should intend such diametrically opposed results. The exclusion of such articles from transportation, with the resulting restriction upon their importation, would also produce a considerable loss in the revenue. Imported meat products are dutiable under paragraphs 273-279 of the tariff of 1897, and you state that "immense quantities of imported sausage, gelatin, meat extract, and other meat food products come into the country every year, and are handled by jobbers and distributed from the ports of entry throughout the United States."

It is clear, therefore, that the provision of the meat inspection amendment in question can not be held to apply to the transportation of imported meat and meat food products. As has been aptly said, "A thing may be within a statute but not within its letter, or within the letter and yet not within the statute. The intent of the law-maker is the law." (Jones v. Guaranty and Indemnity Co., 101 U. S. 622, 626.) A case well illustrating this principle is that of Church of the Holy Trinity v. United States, 143 U. S. 457, 458, where it was held that the alien contract labor law did not apply to a contract for the services of a foreign clergyman, although such contract came within the letter of the statute.

Respectfully,

WILLIAM H. MOODY,
Attorney General.

THE SECRETARY OF AGRICULTURE.

THERE IS NO REPUGNANCY BETWEEN THE PROVISIONS OF THE TEA INSPECTION ACT, MARCH 2, 1897, AND THE FOOD AND DRUGS ACT, SUCH AS TO PREVENT THEM FROM STANDING TOGETHER.¹

[166] DEPARTMENT OF JUSTICE,
February 23, 1907.

SIR: I have the honor to acknowledge receipt of your letter of February 8 in reference to the tea inspection act of March 2, 1897, and the Food and Drugs Act of June 30, 1906, in which, as a preliminary to your action upon certain cases arising out of the administration of the laws governing the importation and examination of teas, you request my opinion "upon the question of law whether the provisions of the Food and Drugs Act of June 30, 1906, regarding adulteration, labeling, misbranding, and guaranty, [167] are applicable to imported tea meeting the requirements of the tea act of March 2, 1897."

The tea inspection act of 1897 is a special act, relating solely to the importation of tea. It provides that the Secretary of the Treasury shall annually appoint a board of tea experts, who shall prepare and submit to him standard samples of tea, and that, upon the recommendation of this board, he "shall fix and establish uniform standards of purity, quality, and fitness for consumption of all kinds of teas imported into the United States." It is made unlawful to import into the United States any tea which is inferior to the standards so provided, and provision is made for the examination of all imports of tea at the custom-house by an examiner to determine their conformity to the standards so fixed, and for reexamination by general appraisers in case of a protest against the finding of an examiner. (29 Stat. 604.)

The Food and Drugs Act of 1906, on the other hand, is a general act relating to all adulterated or misbranded foods or drugs and is not limited in its prohibitions to the matter of their importation. It defines specifically the various cases in which any food or drug shall be deemed to be adulterated or misbranded, and makes it unlawful to manufacture any such adulterated or misbranded food or drug in any Territory or in the District of Columbia, or to introduce the same into any State or Territory, or the District of Columbia, either through interstate or foreign commerce, or to ship the same to any foreign country. In addition to general authority given the Secretaries of the Treasury, of Agriculture, and of Commerce and Labor, to make uniform rules and regulations for carrying out the provisions of the act, including the collection of specimens of food and drugs, for examination in the Bureau of Chemistry of the Department of Agriculture, or under its direction, it is provided, in reference to imports, that the Secretary of Agriculture shall, upon his request, receive samples of food and drugs being imported or offered for import, and that if upon examination any of such articles appear to be adulterated or misbranded, or otherwise dangerous to health, or of a kind forbidden entry or restricted sale in [168] the country of its manufacture or export, or otherwise falsely labeled, it shall be refused admission into this country. (34 Stat., 768.)

This Food and Drugs Act contains no repealing clause whatever, and does not refer to either the tea-inspection act or any of the other earlier statutes regulating the admission of other food and drugs, such as the act of June 26, 1848, providing for the examination at the custom-house of drugs and medicines with reference to their quality, purity, and fitness for medical purposes. (Rev. Stat., sec. 2933 et seq.)

Comparing the tea-inspection act and the Food and Drugs Act, it will be seen that not only is the one special and the other general, but that, even in reference to the importation of teas, the tea-inspection act on the one hand contains no restrictions in reference to the misbranding of teas, and on the other goes further than the Food and Drugs Act in regard to standards of admission, and authorizes the Secretary of the Treasury to establish standards which are not limited to the purity of the tea, but extend broadly to matters of quality and fitness for consumption.

In *Butterfield v. Stranahan* (192 U. S. 470, 496), in which the constitutionality of the tea-inspection act was upheld, and in which the importation was a pure green tea of low grade that had been rejected

as inferior to standard in cup quality alone, that is, in taste and flavor, it was said that the statute, when properly construed, "expresses the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so, because of their inferior quality."

It thus appears that under the tea-inspection act the Secretary of the Treasury may prescribe a standard for the quality of tea whose effect will be to exclude from admission tea which, although in no wise adulterated or misbranded within the meaning of the Food and Drugs Act, is, nevertheless, of such inferior quality as, in his opinion, to require exclusion, while, on the contrary, importation of teas may fall within the prohibition of the Food and Drugs Act, as being deemed either adulterated or misbranded within the meaning of the Food and Drugs Act, although [169] fully complying with the standards of admission that may be established by the Secretary of the Treasury.

The question then arises as to what extent, if any, these two acts can stand together. In the absence of an express repeal of an earlier statute by a later one covering the same subject, the rule is well settled that, as repeals by implication are not favored, effect shall be given to both statutes, unless there is a positive repugnancy between them, in whole or in part, in which case the earlier statute is repealed by implication to the extent of such repugnance; or, unless the provisions of the later statute cover the whole subject-matter of the earlier and are plainly intended as a substitute therefor, in which case there is likewise a repeal of the earlier statute by implication. (Wood v. United States, 16 Pet. 342; Daviess v. Fairbairn, 3 How. 636; United States v. Tynen, 11 Wall. 88; Henderson's Tobacco, 11 Wall. 652; State v. Stoll, 17 Wall. 425; Fabbri v. Murphy, 95 U. S. 191; Ex parte Crow Dog, 109 U. S. 556; Chew Hoeng v. United States, 112 U. S. 536.)

In Wood v. United States, 16 Pet. 342, 362, it is said, in reference to the question of the repeal of an earlier statute by implication:

It is not sufficient * * * that subsequent laws cover some or even all of the cases provided for by it; for they may be merely affirmative, or cumulative, or auxiliary.

And in State v. Stoll (17 Wall. 425, 431) the rule is thus stated:

If, by any reasonable construction, the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part or wholly, as the case may be.

Further, in Ex parte Crow Dog (109 U. S. 556, 570), it is said, in reference to the rule that a later general act is not to be construed as repealing a previous special act, except by express provision or positive repugnancy:

The rule is *generalia specialibus non derogant*. "The general principle to be applied," said Bovill, C. J., in Thorpe v. Adams (L. R. 6 C. P., 135), "to the construction of acts of Parliament is that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the [170] subject, or unless there is a necessary inconsistency in the two acts standing together." "And the reason is," said Wood, V. C., in Fitzgerald v. Champenys (30 L. J. N. S. Eq. 782; 2 Johns & Hem., 31-54), "that the legislature having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do."

Applying these principles of construction to the two acts in question, I am of the opinion that there is no such repugnancy between the special tea-inspection act of 1897 and the general Food and Drugs Act of 1906 as to prevent them, generally speaking, from standing together; that the provisions of the tea-inspection act cover in respect to the importation of tea matters not embraced within the Food and Drugs Act, while the Food and Drugs Act in turn imposes restrictions upon the importation of all food and drugs, including tea, which are not necessarily embraced in the tea-inspection act; that the Food and Drugs Act does not plainly appear to have been intended as a substitute for the earlier statute in the matter of the importation of tea; but that, generally speaking, the two statutes are cumulative in so far as the importation of tea is concerned and should both be given effect; and hence, that an importation of tea is now subject to the provisions of both of these acts, that is to say, it must comply with the standards established by the Secretary of the Treasury under the tea-inspection act and must also stand the tests in reference to adulteration and misbranding imposed by the Food and Drugs Act. I am therefore of the opinion, to reply specifically to your question, that imported tea, although meeting the requirements of the tea-inspection act of 1897, is still subject to the provisions of the Food and Drugs Act regarding adulteration, labeling, misbranding, and guaranty.

It, of course, follows from what has been said that, if in the administration of these laws there should develop a repugnancy between any specific provisions of the two statutes, to the extent of such repugnancy the provisions of the [171] Food and Drugs Act would prevail, and any conflicting provisions of the tea-inspection act would, to such extent, be impliedly repealed.

Respectfully,

CHARLES J. BONAPARTE,
Attorney General.

THE SECRETARY OF THE TREASURY.

LABELING OF WHISKY.¹

[263] DEPARTMENT OF JUSTICE,
May 29, 1907.

SIR: In accordance with your instruction, I gave a hearing on Wednesday, May 15, to persons desiring to submit to the department criticism or other comment on my opinion of April 10 last past, as to the construction of section 8 of the act approved June 30, 1906, and generally known as the pure-food law. About thirty persons appeared on this occasion and a number of oral arguments were presented; some critical and some approbatory of the opinion in question. At the conclusion of this argument I announced my willingness to receive and consider any matters in writing which might be submitted to me touching its subject-matter, and, in response to several requests for a further hearing, stated that I would give these requests due consideration and announce later whether I saw any

¹ 26 Op. Att. Gen. 262. See F. L. D. Nos. 45, 65, 95, 98, 113, 118, and 127, pp. 36, 51, 110, 113, 129, 133, and 139, *ante*; see also Opinions of the Attorneys General, pp. 783 and 797, *post*; Report of the Solicitor General, p. 818, *post*; and Decision of the President, p. 831, *post*.

sufficient reason to comply with them. As heretofore stated to you verbally, I do not think any useful purpose would be served by another oral argument, and, with your approval, I have, therefore, announced that, in this respect, the matter must be considered closed. I received a large number of written communications from various persons commenting on the opinion in question, and I have carefully considered all of them. I find no reason to withdraw the said opinion, or to modify it in any respect, and I respectfully report that, in my judgment, this opinion correctly states the law on the subject to which it relates. As a matter of courtesy, however, to the gentlemen who have favored me with their views, and to remove some misapprehensions which seem to exist respecting the opinion in question, I think it appropriate to further consider in this final report some of the questions discussed at the oral hearing and in the written communications hereinbefore stated.

It seems to be thought by some of the critics of the opinion heretofore rendered that I considered myself bound by [264] the definition of "whisky" adopted by the Department of Agriculture and contained in the papers heretofore submitted to me, and, therefore, that the correctness of the opinion, in so far as this depended upon an accurate definition of the word in question, would be successfully impeached by showing an error on the part of the said department in its said definition. This view misapprehends the purport of the opinion. In point of fact, while stating, in substance, that I held the definition in question to be accurate for all purposes directly material to the subject under discussion, I yet ventured to respectfully question its entire accuracy, because, in the words of my opinion, it was not "quite broad enough to meet the general intent of the law of 1906." Of course, if the proper definition of "whisky" were a question of fact, this department would be bound by the statements on the subject contained in the papers submitted to it when instructed to furnish an opinion; but I do not consider this a question of fact. When words are used in a technical or conventional sense, their proper definition must be established by evidence and found by a tribunal appropriate to pass upon questions of fact; but when the words are used in their ordinary meaning, then, in the words of Mr. Justice Gray in *Nix v. Hedden* (149 U. S. 306), "of that meaning the court is bound to take judicial notice as it does in regard to all words in our own tongue, and upon such a question dictionaries are admitted, not as evidence, but only as aids to the memory and understanding of the court;" that is to say, in the language of the Chief Justice in *Sonn v. Magone* (159 U. S. 421), "the interpretation of words of common speech is within the judicial knowledge, *and matter of law*." In the first of these two cases the Supreme Court held it to be a question of law whether tomatoes were fruits or vegetables; in the second, whether dried lentils and white beans were vegetables or seeds; as it had previously determined in *Marvel v. Merritt* (116 U. S. 11) that iron ore was a mineral substance. I think, therefore, the proper definition of "whisky" for the purposes of the pure-food law is a question of law, it being, to my mind, quite clear that for [265] these purposes, the term is to be given its ordinary significance as a word of everyday speech, and is not to be understood in any commercial or scientific sense, as it might be by a distiller, or rectifier, a chemist or a physician. For the purposes of my opinion, I

had to determine its proper definition just as in *Eureka Vinegar Company v. Gazette Printing Company* (35 Fed. 570) the court had to determine the definition of "cider," and as in *United States v. Ash* (75 Fed. 652) the court took judicial cognizance of what was "whisky" and even of what was a "whisky cocktail."

In establishing the meaning of "like substances," as used in the pure-food law, to determine whether a mixture shall be properly called a "blend" or a "compound," I was able to find no judicial authority which appeared to me sufficiently in point to make its citation appropriate. The essential meaning of "like," as here used, is evidently "of the same class," and on what this class includes must depend the purpose of the classification, or, in other words, the ends of the law. The primary aim of the pure-food law, as explained in my previous opinion, is, in my judgment, to secure an accurate and serviceable nomenclature for articles of food, and its construction is, therefore, governed by rules in some respects different from those applicable to statutes passed for wholly different purposes, as, for example, laws imposing duties on imports; therefore, although my attention had been called, even before the hearing on May 15, to certain decisions of the Supreme Court construing the phrase "of similar description," which may be assumed *argumenti gratia* to be synonymous with "like," I did not consider it necessary, in that opinion, to cite or discuss these decisions. It may be, however, well for me to here point out that if they are to be regarded as authorities relevant to the question considered in this connection in the previous opinion, namely, whether ethyl alcohol and whisky are "like substances," they appear to fully sustain the conclusion therein announced. In *Greenleaf v. Goodrich* (101 U. S. 278) and *Schmieder v. Barney* (113 U. S. 646) the Supreme Court held that the similarity required by this designation is "a similarity in [266] respect to the product and its adaptation to uses and to its uses, and note merely to the process by which it was produced," and that the material question to be determined in such case would be whether "the goods were or not substantially the same or substantially different." Now I think it is quite clear that, while there may be a similarity in the processes whereby whisky and ethyl alcohol, respectively, are produced from grain mash, alcohol and whisky are not, according to the common understanding of the general public, similar in their respective adaptation to uses and their respective uses in fact. I believe that according to the first thought of an ordinarily intelligent and well-informed man, whisky is adapted for use, and is used, as a beverage, and alcohol is adapted for use, and used, in medicine or in the arts, and I am satisfied that such a man, if asked the question, would, in a great majority of instances, reply without hesitation that alcohol and whisky were substantially different and not substantially the same things.

It was developed at the hearing before me that some, at least, of the dealers in whisky who questioned the correctness of my opinion claimed that ethyl alcohol and whisky are not merely "like," but identical; that whisky is ethyl alcohol and ethyl alcohol is whisky. Their argument was, in substance, that ethyl alcohol was whisky from which certain congeneric substances, termed by them "impurities," had been removed; and whisky was ethyl alcohol in which these "impurities" had been allowed to remain, or to which some substi-

tute for them had been added. Now it is obvious that "impurities" is a question-begging term, and, if it be admitted that substances so designated are really congeneric with the whisky, it is an illogical, and, therefore, an inappropriate designation. Pearls in an oyster may be the result of disease or injury to the animal, but when we speak of "pearl-bearing oysters," they constitute a very important portion of the idea thus expressed. If the so-called "impurities" are an essential part of whisky, or, in other words, if, in the language of the definition of the Department of Agriculture, they "give character to the dis- [267] tillate," then it is as inaccurate to describe a substance destitute of them as "purified" or "rectified" whisky as it would be to speak of sugar and water as "lemonade without lemons."

To show how the Congress intended the pure-food law, and, especially, the provision as to "like substances," "blends" and "compounds," to be construed, my attention has been called to remarks of speakers in debate on the bill, and to proceedings before committees of one or the other House of Congress. In the language of Mr. Justice Peckham, in *United States v. Trans-Missouri Freight Association* (166 U. S. 318),

there is * * * a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. * * * The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did, and those who spoke might differ from each other, the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed.

Thus construed, there would seem to be little difficulty in determining the purpose of the Congress in restricting the use of the word "blend" to a mixture of "like substances," supposing, of course, that this provision was inserted with a view *inter alia* to the labeling or branding of whisky. The Congress must be presumed to have legislated with reference to well-established processes in the manufacture and sale of distilled spirits. There can be no doubt that, according to such practice, "straight" whisky was mixed only with two substances, besides mere coloring and flavoring materials, namely, with "straight" whisky of another kind, and with ethyl alcohol. There is an evident intent on the face of the statute to confine the use of the word "blend" to one kind of mixture and to forbid its use for another kind of a mixture; and, since the Congress must be [268] supposed to have legislated with regard to existing facts, and, consequently, since the mixture to which it intended to deny the designation "blend" must be either a mixture of two different kinds of whisky, or a mixture of whisky with the one other substance generally mixed with it—namely, ethyl alcohol—it follows that, unless we are prepared to say that ethyl alcohol is more "like" to whisky than one whisky is to another, it is reasonable to conclude that the Congress intended to deny the designation "blend" to a mixture of whisky and ethyl alcohol. If this provision was, in fact, inserted with some reference to whiskies (which seems to be generally assumed as a fact by both sides to this controversy), then it is impossible to see why the provision as to blends and compounds was inserted at all, if the Congress considered whisky and ethyl alcohol to be "like substances."

So far as I am informed, no combination of whisky with another substance was manufactured and sold, either as a "blend" or otherwise, when the pure-food law was enacted, to which the designation "blend" could be denied, or which could be properly labeled a "compound," if the Congress held ethyl alcohol to be a "like substance" to whisky. I have found, therefore, no difficulty in concluding that, according to all the well-established canons of statutory construction, these two kinds of spirits are not to be considered "like substances" for the purposes of the pure-food law.

Of course, if the Congress thinks they should be, effect can be readily given to the legislative will by an amendment of the law. However, having given a very patient and careful consideration to the entire subject, I respectfully advise you that, as above stated, the opinion already rendered must stand as that of this department; and I suggest that parties whose interests may suffer from the administration of the law as thus determined, take, as soon as may be practicable, appropriate measures to obtain a judicial determination of the questions involved.

I remain, sir, yours respectfully,

CHARLES J. BONAPARTE,
Attorney General.

The PRESIDENT.

THE DRUGS AND MEDICINE ACT OF 1848 AND THE FOOD AND DRUGS ACT ARE CUMULATIVE AND SHOULD BOTH BE GIVEN EFFECT, AND AN IMPORTATION OF DRUGS SHOULD NOT BE ADMITTED IF IT FAILS TO CONFORM TO THE STANDARD ESTABLISHED BY THE FORMER OR TO THE TESTS IMPOSED UNDER THE LATTER.¹

[311] DEPARTMENT OF JUSTICE,
July 17, 1907.

SIR: I have the honor to acknowledge the receipt of your letter of the 10th ultimo in which, in connection with an application for reexamination of certain lemon and orange oil imported by G. H. Reitmann at the port of New York, which has been denied entry by the appraiser, you request [312] an expression of my opinion upon certain questions arising under the drugs and medicine act of 1848 and the Food and Drugs Act of 1906.

1. The first question submitted is whether in applying the drugs and medicine act of 1848 to importations originating in Italy, the standard of strength and purity to be enforced is that established by either the Italian pharmacopœia or by any of the foreign pharmacopœias mentioned in the act.

The drugs and medicine act of 1848, which is embodied in sections 2933 and 2937 of the Revised Statutes, provides that all drugs, medicines, and medicinal preparations shall, before passing the custom-house, be examined in reference to their quality, purity and fitness for medical purposes (section 2933); that if they are found, "in the opinion of the examiner, to be so far adulterated or in any manner

deteriorated, as to render them inferior in strength or purity to the *standard* established by the United States, Edinburg, London, French, and German pharmacopœias and dispensaries, and thereby improper, unsafe, or dangerous to be used for medicinal purposes, a return to that effect shall be made upon the invoice, and the articles so noted shall not pass the custom-house" (section 2935), unless the owner or consignee shall call for an analytical reexamination at his own expense, when the collector shall cause a careful analysis of the articles to be made by a competent analytical chemist (sections 2935, 2936); that the sworn report of this chemist shall be final, and if it declares "the return of the examiner to be erroneous and the articles to be of the requisite strength and purity according to the *standards* referred to in the next preceding section, the entire invoice shall be passed without reservation, on payment of the customary duties" (section 2936); but that if the report sustains the examiner's return, the articles shall be reexported within six months or the collector shall cause them to be destroyed (section 2937).

The Italian pharmacopœia, it will be seen, is not one of those made a standard by the act.

The ambiguity of the language in the act, especially in the use of the words "standard" in one section and "stand[313]ards" in another, makes it doubtful, as an original question, whether it was intended to require an importation of drugs and medicines to conform to the several standards of each and all of the pharmacopœias mentioned; or to the standards of any one of them; or to the general standard established by them all considered together, so that an importation falling below the standard of all of them would necessarily be excluded, but if meeting the standard of some of them, but not of others, it would not be excluded unless it fell so far below the general standard as to render its use improper, unsafe, or dangerous.

The construction of the act, therefore, being one of doubt, it is proper to resort to the construction which has been placed upon it by the Treasury Department. (22 Opin. 163, 167.)

It appears that almost immediately after the passage of this act a definite construction was placed upon it by the Treasury Department, which has been uniformly followed to the present day. I am advised that in article 249 of the Customs Regulations published by the Treasury Department in 1857, being the first edition after the passage of the act of 1848, the following reference was made to the drugs and medicine act:

It will be observed, on reference to the third section of the act, that all imported "drugs, medicines, and medicinal preparations, &c.," are to be tested in reference to their strength and purity by the standards established by the United States, Edinburg, London, French and German pharmacopœias and dispensaries." It is not conceived to be the intention of the law that the articles referred to should conform in strength and purity to each and all of those standards, as such conformity is believed to be impracticable, owing to the variations in those standards. If, therefore, the articles in question be manufactured, produced, or prepared in England, Scotland, France, or Germany, as the case may be, and prove to conform in strength and purity to the pharmacopœia and dispensatory of the country of their origin, said articles become exempt from the penalties of the law. All articles of the kind mentioned, produced, manufactured or prepared in any other [314] country than those before mentioned, must conform to the qualities stated in the United States pharmacopœia and dispensatory.

I am further advised that the construction thus given to the drugs and medicine act has been retained in all subsequent editions of the Customs Regulations, article 1285 of the Customs Regulations of 1889, which are now in force, providing that if imported drugs, medicines, and medicinal preparations are "manufactured, produced, or prepared in England, Scotland, France, or Germany, and conform in strength and purity to the pharmacopœia and dispensatory of the country of their origin, they are exempt from the penalties of the law; but if produced, manufactured, or prepared in any other country than those last mentioned, they must conform to the United States pharmacopœia and dispensatory."

It is a well-settled rule that "when the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the department charged with its execution, where the construction has, for many years, controlled the conduct of the public business," and that uniform and long-continued executive construction is "not to be disregarded without the most cogent and persuasive reasons" (*Robertson v. Downing*, 127 U. S. 607; *United States v. Healey*, 160 U. S. 136, 141); the weight to be given such construction being greater where the statute has been subsequently reenacted by Congress (*United States v. Falk*, 204 U. S. 143, 152).

Applying this rule of construction, I am of opinion that, in view of the great doubt as to the true meaning of the original act of 1848, the construction which has been uniformly given to its provisions by the Treasury Department for more than half a century should not now be disregarded, especially in view of the fact that it was reenacted in the Revised Statutes after this construction had been given for many years, and that the provisions of the Revised Statutes in which the act is embodied are to be now construed in conformity with the Customs Regulations, that is to say, that if the importation originates in any of the countries whose pharmacopœias are mentioned, [315] such pharmacopœia is to be the standard, but if it originates in any other country, then the United States pharmacopœia is to control; and hence, to specifically answer your question, that in enforcing the provisions of the drugs and medicine act of 1848 in reference to an importation originating in Italy, the pharmacopœia whose standard is to be applied is not that of Italy or any other foreign country, but that of the United States.

2. The other question which you submit is: Whether the conformity of such importation to the standard imposed by the act of 1848 entitles it to admission into this country as against any test which may be applied by the direction of the Secretary of Agriculture under section 11 of the Food and Drugs Act of June 30, 1906, or whether the provisions of the act of 1906 regarding adulteration, misbranding, and false labeling are also to be applicable.

The Food and Drugs Act of 1906 (34 Stat. 768) is a general act relating to the manufacture, sale, and transportation of adulterated or misbranded food or drugs. It defines specifically the various cases in which any food or drug shall be deemed to be adulterated or misbranded and provides in section 11 that:

The Secretary of the Treasury shall deliver to the Secretary of Agriculture, upon his request from time to time, samples of foods and drugs which are being imported into the United States or offered for import, giving notice thereof to the consignee, who may appear before the Secretary of Agriculture,

and have the right to introduce testimony; and if it appear from the examination of such samples that any article of food or drug offered to be imported into the United States is adulterated or misbranded within the meaning of this act, or is otherwise dangerous to the health of the people of the United States, or is of a kind forbidden entry into, or forbidden to be sold or restricted in sale in the country in which it is made or from which it is exported, or is otherwise falsely labeled in any respect, the said article shall be refused admission, and the Secretary of the Treasury shall refuse delivery to the consignee and shall cause the destruction of any goods refused delivery which shall not be exported by the con- [316] signee within three months from the date of notice of such refusal under such regulations as the Secretary of the Treasury may prescribe.

Comparing the drugs and medicine act and the Food and Drugs act, it will be seen that not only is the one special and the other general, but that in reference to the importation of drugs, while the drugs and medicine act on the one hand contains no restriction as to misbranding, each of the two acts on the other hand imposes certain tests in regard to the admission of imported drugs which are not contained in the other.

In an opinion which I rendered the Secretary of the Treasury on February 23, 1907, in reference to the tea-inspection act of 1897, the effect of the Food and Drugs Act upon an earlier special statute was carefully considered. (26 Opin. 166.) For reasons analogous to those which are therein stated, I am of the opinion that in the matter of the importation of drugs, the drugs and medicine act and the Food and Drugs Act are, generally speaking, cumulative and should both be given effect, and that an importation of drugs should not be admitted if it fails to conform either to the standard established by the drugs and medicine act or to the tests imposed under the Food and Drugs Act; and, hence, to reply specifically to your question, that drugs imported from Italy, although meeting the standard required by the drugs and medicine act, are still subject to the provisions of the Food and Drugs Act regarding adulteration, misbranding, and false labeling, and to any test that may be applied to them by the direction of the Secretary of Agriculture in accordance with section 11 of that act.

It follows, of course, that the provisions of the drugs and medicine act, that importations found to conform to the standard therein imposed shall be thereupon "passed without reservation, on payment of the customary duties" (R. S., 2936) are repealed by implication, as applied to importations which are subject to rejection under the tests of the Food and Drugs Act.

In this connection, it should be noted, that if, as I have been advised, the laws of Italy forbid the sale of a drug which does not conform to the standard of the Italian [317] pharmacopœia, it would follow that although a drug imported from Italy might not be subject to exclusion under the drugs and medicine act by reason of non-conformity to the Italian pharmacopœia, it might still be excluded under section 11 of the Food and Drugs Act as being "of a kind forbidden entry into, or forbidden to be sold or restricted in sale in the country in which it is made or from which it is exported."

Respectfully,

CHARLES J. BONAPARTE,
Attorney General.

The SECRETARY OF THE TREASURY.

MARKING AND BRANDING SPIRIT CASKS.¹

[476] DEPARTMENT OF JUSTICE,
January 11, 1908.

SIR: I am duly in receipt of your letter of the 16th ultimo, in which you request my opinion "as to what directions should be issued and steps taken by this department with regard to the marking and branding of casks and packages of distilled spirits, to the end that the regulations so issued may be in harmonious accord, if possible, with those of the Department of Agriculture, looking to the enforcement of the pure-food law." If this inquiry could be construed as a request that I offer suggestions as to the form of instructions to be given your subordinates or of regulations to be adopted by your department, for the purpose of securing an administration of the act generally known as the "pure-food law," in harmony with the action of the Department of Agriculture in relation to the same subject, it would seem obvious that such suggestion on my part would not constitute an answer to a "question of law," [477] as the term is used in section 356, Revised States. I understand your request, however, as asking, in substance, my opinion as to how far, if at all, sections 3287, 3289, and 3449 of the Revised Statutes, as amended by subsequent legislation, are amended or repealed by the pure-food law (34 Stat. 768), and whether the regulations of the Commissioner of Internal Revenue set forth in your above-mentioned letter are now authorized by the existing law. To this inquiry, I have the honor to reply as follows:

The above-mentioned sections of the United States Revised Statutes, as amended by subsequent legislation, read as follows:

Drawing off, gauging, etc., and removal of spirits to warehouse.

Sec. 3287. All distilled spirits shall be drawn from the receiving cisterns into casks or packages, each of not less capacity than ten gallons wine measure, and shall thereupon be gauged, proved, and marked by an internal-revenue gauger, who shall cut on the cask or package containing such spirits, in a manner to be prescribed by the Commissioner of Internal Revenue, the quantity of wine gallons and in proof gallons of the contents of such casks or packages, and the particular name of such distilled spirits as known to the trade—that is to say, high wines, alcohol or spirits, as the case may be, shall be marked or branded on the head of such cask or package in letters of not less than one inch in length; and the spirits shall be immediately removed into the distillery warehouse, and the gauger shall, in the presence of the storekeeper of the warehouse, place upon the head of the cask or package an engraved stamp, which shall be signed by the collector of the district and the storekeeper and gauger; and shall have written thereon the number of proof gallons contained therein, the name of the distiller, the date of the receipt in the warehouse, and the serial number of each cask or package, in progressive order, as the same are received from the distillery. Such serial number for every distillery shall be in regular sequence of the serial number thereof, beginning with number one (No. 1) with the first cask or package deposited therein [478] after July twentieth, eighteen hundred and sixty-eight, and no two or more casks or packages

¹ 26 Op. Att. Gen. 474. For opinion of the Attorney General on internal revenue regulations based on this opinion, see 26 Op. Att. Gen. 541. See also F. I. D. 45, 65, 95, 98, 113, 118, and 127, pp. 36, 51, 110, 113, 129, 133, and 139, *ante*; Opinions of the Attorneys General, pp. 775, *ante*, and 779, *post*; Report of the Solicitor General, p. 818, *post*; and Decision of the President, p. 831, *post*, on the labeling of whiskies.

warehoused at the same distillery shall be marked with the same number. The said stamp shall be as follows:

Distillery-warehouse stamp No. —. Issued by ———, collector, ——— district, State of ———, distillery warehouse of ———, 18—, Cask No. —; contents ——— gallons proof spirits.

Attest:

United States Storekeeper..

United States Gauger.

Provided, however, That upon the application of the distiller, and under such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe, distilled spirits may be drawn into wooden packages, each containing two or more metallic cans, which cans shall have each a capacity of not less than five gallons, wine measure, such packages to be filled and used only for exportation from the United States. And there shall be charged for each of said packages or cases for the expense of providing and affixing stamps, five cents, instead of ten cents, as now required by law.

Forfeiture of unstamped packages.

SEC. 3289. All distilled spirits found in any cask or package containing five gallons or more, without having thereon each mark and stamp required therefor by law, shall be forfeited to the United States.

Removing any liquors or wines under other than trade names; penalty

SEC. 3449. Whenever any person ships, transports, or removes any spirituous or fermented liquors or wines, under any other than the proper name or brand known to the trade as designating the kind and quality of the contents of the casks or packages containing the same, or causes such act to be done, he shall forfeit said liquors or wines, and [479] casks or packages, and be subject to pay a fine of five hundred dollars.

I am informed by your letter that the regulations of the Commissioner of Internal Revenue contain the following provisions:

The gauger will also mark or brand with a die, stencil, or branding iron on the head of the cask, in letters not less than 1 inch in length, the particular name of the spirits as known to the trade, which mark or brand will be varied to suit whatever kind is contained in the package, as "high wines," "rye," "Bourbon," or "copper distilled" whisky, as the case may be.

He will also cut or burn the date of inspection so that the head of the cask will appears as follows:

[Drawing of head of cask here set out in illustration.]

In addition to attaching the stamp for rectified spirits and cancelling the same, the gauger will cut upon the bung stave the result of the inspection in the manner directed herein under the head of "Gauging and marking spirits in warehouse upon request of distiller," and mark upon the head of each cask with a stencil plate in durable ink his name and office, the date of inspection, the particular name of such spirits as known to the trade, the proof, the name and place of business of the rectifier, and the serial number of the stamp for rectified spirits affixed thereto.

[Drawing of head of cask here set out in illustration.]

The act approved June 30, 1906, generally known as the "pure-food law," is entitled:

An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes.

The portion of that law which seems to be relevant to the matters under discussion is the following:

SEC. 8. That the term "misbranded," as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding

such article, or the ingredients or substances contained [480] therein, which shall be false or misleading in any particular. * * * That for the purposes of this act an article shall also be deemed to be misbranded: * * * In the case of food: First. If it be an imitation of or offered for sale under the distinctive name of another article. * * * Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

Second. In the case of articles labeled, branded, or tagged, so as to plainly indicate that they are compounds, imitations, or blends, and the word "compound," "imitation," or "blend," as the case may be is plainly stated on the package in which it is offered for sale: *Provided*, That the term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only: *And provided further*, That nothing in this act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding.

In an opinion rendered by me to the President on April 10, 1907, I said of the purpose of this law:

[481] The primary purpose of the pure-food law is to protect against fraud consumers of food or drugs; as an incident or secondary purpose, it seeks to prevent, or, at least, discourage the use of deleterious substances for either purpose; but its first aim is to insure, so far as possible, that the purchaser of an article of food or of a drug shall obtain nothing different from what he wishes and intends to buy. According to the recognized canons of statutory construction, the language of its provisions must be interpreted with reference to and in harmony with this primary general purpose; so that, in determining the proper nomenclature for articles of food as defined in the act, the intention of the law will be best observed by giving to such articles names readily understood and conveying definite and familiar ideas to the general public, although such names may be inaccurate in the view of a chemist or physicist or an expert in some particular industrial art, as in the distillation and refining of spirits. Moreover, the same name may be given by dealers or by the general public to two or more substances, varying very materially in their scientific characteristics, and this fact must be given due weight in passing upon questions of branding or labeling under the law.

It is obvious that the purpose of this act, as thus defined, is an altogether different purpose from that of the provisions of law relating to internal revenue. The Congress can not be presumed to have had in mind, at the time of its enactment, the substitution of new provisions for any of those affecting the last-mentioned subject-matter of legislation, and, under such circumstances, it is a well-established rule of statutory construction that the language of the later statute will be harmonized, if possible, with that of the earlier and will be held to have modified the earlier only in so far as they are plainly in conflict. In the event, however, of an evident conflict between the terms of the two enactments, those of the later must of course prevail. Applying these rules of construction, I find nothing in section 3287 of the Revised Statutes which is necessarily repealed by section 8 of the pure-food law. Section 3287 [482] regulates the removal of distilled spirits from the receiving cisterns of a distillery, pre-

scribes the minimum size of the receptacles into which such distilled spirits may be drawn, and requires the gauger, in a manner to be prescribed by the Commissioner of Internal Revenue, to mark on the casks or packages, *inter alia*, "the particular name of such distilled spirits as known to the trade—that is to say, high wines, alcohol, or spirits, as the case may be." This statute constitutes a declaration by the Congress that when distilled spirits left the receiving cisterns they had one or the other of certain appropriate trade names, that is to say, "high wines," "alcohol," or "spirits, as the case may be," the last five words being, in my opinion, intended to apply to "spirits" *only* and *not* to "high wines" on the one hand or "alcohol" on the other hand. It is, of course, quite immaterial whether this legislative declaration was or was not in accordance with the fact as to trade usages at the time of its adoption, or is, or is not, in conformity with such usages at present. The Congress thereby prescribed certain names and only those given or authorized by implication as proper to be given to distilled spirits when such spirits should leave the receiving cistern; and, in construing this statute, as we must, with relation to well-known facts in connection with the art of distillation, it seems plain that the Congress considered the several kinds of "spirits" in the restricted sense in which the word is used in this part of section 3287, liquids which were neither "high wines" nor yet "alcohol"; it being a notorious fact that the substances cogeneric with alcohol found in what is practically the first product of distillation (that is to say, in "high wines") must be partially transformed or their properties otherwise eliminated to convert this product into some form of *potable* "spirits," and no less certain that if they be removed, for practical purposes, altogether, the process converts the said product into commercial "alcohol."

The thirteenth definition of "spirit (*pl.*)" given by Webster is: "Rum, whisky, brandy, gin, and other distilled liquors having much alcohol, in distinction from wines and malt liquors." In my opinion the words: "spirits, as the[483] case may be," are used in conformity to this definition and mean: "That distilled liquor included within the definition of 'spirits' which may be appropriate in the particular case," that is to say, "rum" or "whisky," "brandy," or "gin," or whatever other name of a distilled liquor may be suitable. The brand or label, however, must contain only a *general name* of a spirit; no description or particular designation is required, contemplated, or, in my opinion, allowed by the terms of section 3287.

The law evidently requires these brands or labels to be truthful, that is to say, if the liquid contained in the casks or packages is really so-called "neutral spirit," or, in other words, for practical purposes, "ethyl alcohol," this statute requires it to be branded or labeled "alcohol," and does not permit it to be labeled a particular kind of potable spirits, as, for example, "whisky"; but, supposing the brands and labels to be truthful, I can not see how such articles could be regarded as "misbranded" under the provisions of section 8 of the pure-food law, above quoted. I advise you, therefore, that, in my opinion, there is no inconsistency between the provisions of section 3287 of the Revised Statutes and section 8 of the pure-food law, and that the former statute is not superseded or repealed by the latter.

The same is true of section 3289. I find nothing in the pure-food law which renders the provision of that section inappropriate, and it

was not, in my opinion, repealed, either expressly or by necessary implication, by the enactment of the said law.

With respect to section 3449 there is more difficulty. Sections 2 and 10 of the pure-food law (34 Stats., 768) so far as material for our present purpose, are as follows:

SEC. 2. That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this act, is hereby prohibited; and any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State [484] or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor, and for such offense be fined not exceeding two hundred dollars for the first offense, and upon conviction for each subsequent offense not exceeding three hundred dollars or be imprisoned not exceeding one year, or both, in the discretion of the court.

SEC. 10. That any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act, and is being transported from one State, Territory, District, or insular possession to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, or if it be sold or offered for sale in the District of Columbia or the Territories, or insular possessions of the United States, or if it be imported from a foreign country for sale, or if it is intended for export to a foreign country, shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation.

It is my opinion that these provisions, in connection with section 8, above quoted, prescribe for the shipment, transportation, or removal of any spirituous or fermented liquors or wines from one State or Territory to another or from or to or within the District of Columbia, or from or to any foreign country, or from or to the insular possessions of the United States, a different brand or mark on an article so transported from that required by section 3449. The proper name or brand known to the trade may yet be one containing a "statement," "design," or "device," which [485] may be false or misleading in some particular. As pointed out in the extract heretofore given from the opinion rendered by me to the President on April 10 last past, I think the names intended by the pure-food law to be used in brands or labels should be—

names readily understood and conveying definite and familiar ideas to the general public, although such names may be inaccurate in the view of a chemist or physicist or an expert in some particular industrial art, as in the distillation and refining of spirits.

It follows that the name "known to the trade as designating the kind and quality" of a wine or a spirituous or fermented liquor may not be one conveying to the general public accurate information as to such character or quality, and, in so far as the provisions of section 3449 relate to shipment, transportation, or removal not wholly within the limits of a State, it seems to me clear that it was repealed by the adoption of the pure-food law; this construction being strengthened

by the fact that the latter prescribes an altogether different punishment for the offenses described in both.

It is yet more difficult to determine whether section 3449 is to be considered as repealed in so far as it relates to purely intra-State shipment, transportation, or removal. So far as I am informed, however, either by your letter and the accompanying documents or from any other source properly open to the consideration of this department, this question has not yet arisen in a practical form, and, in view of its inherent difficulty, I think it more appropriate to defer the expression of any opinion regarding it until circumstances render such expression necessary.

The regulations quoted in your letter and herein before set forth are in conformity with the provisions of section 3287, except in one particular. That section does, indeed, require the gauger to cut on the cask or package containing the distilled spirits drawn from the receiving cistern "the particular name of such distilled spirits, as known to the trade;" and if this passage stood alone, or if the words immediately succeeding could be construed as used by way of illustration only, the regulations in question might perhaps be justified by the terms of the law; but when the Congress adds to the language just quoted the words "that is to say, [486] high wines, alcohol, or spirits, as the case may be," I am obliged to conclude that the intention of the law was to have casks or packages not containing either "high wines" or "alcohol" marked with the name of a recognized distilled liquor included within the definition of potable "spirits" and *nothing more*. In view of the long-continued practice of your department, as set forth in your letter and the accompanying documents, and the administrative construction thereby given to the statute of 1879, now constituting section 3287, I should be very reluctant to reach this conclusion were it not for the fact that these regulations seem to me clearly inconsistent with the terms of the pure-food law, and, if they were justified by section 3287, the section would have to be considered *pro tanto* amended by the law in question. In saying this I am not unmindful of the fact that the marking to be done under the provisions of section 3287 must be ordinarily a purely intra-State act. But not to mention the improbable contingency of a distillery being located so near the boundaries of two States that its warehouse might be on the other side, it is in no wise improbable that a distillery should be located in the District of Columbia; in which case, for the reason already given with respect to section 3449, these regulations would be in evident conflict with the provisions of the pure-food law.

It does not appear from your letter or any of the accompanying documents upon what information the gauger is expected to act in determining the particular name of the spirit "as known to the trade" when he marks the package or cask. If the construction which I have placed on section 3287 is correct, there would be very little, if any danger, of misbranding the articles he has to mark, since there could hardly be, in any instance, room for serious doubt as to whether the substance was high wines, potable spirits, or alcohol, or, in the secondly mentioned contingency, whether it was rum or brandy or some other well-known liquor; but the regulations you have called to my attention appear to impose upon the gauger the duty of determining questions respecting the character of the spirit which might

be readily attended with considerable difficulty, and this con- [487] stitutes, to my mind, a further reason for confidence in the opinion I have expressed that these regulations can not be sustained under the section in question, independently of the operation of the pure-food law. It is needless to add that the law evidently would not sanction the marking of the casks or packages on merely hearsay information obtained from the distiller or his representative. Such a practice would amount to allowing a manufacturer to mark his own product and have the United States, without inquiry, guarantee the accuracy of his marking.

I advise you, therefore, that the portions of your regulations to which you have called my attention are, in my opinion, contrary to law in the respects above indicated, and need to be modified in accordance with the law as indicated in this opinion.

I remain, sir, yours, respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE TREASURY.

THE SALE BY MILITARY AUTHORITIES OF THE
UNITED STATES OF CONDEMNED MEDICINES WHICH
HAVE DETERIORATED IS SUBJECT TO THE PROVI-
SIONS OF THE FOOD AND DRUGS ACT.¹

[547] DEPARTMENT OF JUSTICE,
March 27, 1908.

SIR: I have the honor to acknowledge the receipt of your letter of the 23d instant in which you state that certain drugs and medicines of the Medical Supply Depot, United States Army, New York City, which were purchased before the enactment of the Food and Drugs Act of June 30, 1906, have been inspected and condemned, as "deteriorated, not fit for issue" and as "fermented, unfit for issue," and that your department, upon the recommendation of the inspector, has ordered the same to be sold under the authority of section 1241 of the Revised Statutes. You further state that the proposed sale would cover the goods in the original cases bearing the marks of the original makers or vendors; and that since on account of the deterioration of these supplies the state of purity of each article can not be known without an analysis, it would be impracticable to mark each case according to its actual contents.

You thereupon request an expression of my opinion upon the three following questions:

Whether the sale of these condemned drugs and medicines under section 1241, Revised Statutes, would be within the purview of the Food and Drugs Act, as distinguished from a sale by a private vendor, so as to render the officers making the sale liable under the act;

Whether, if such sale comes within the terms of the act, it would be sufficient to label each original package as follows: "Deteriorated military supplies. Condemned and sold under section 1241, Revised Statutes; and

Whether, in any event, the sale of the articles would involve any liability on the part of the original makers or vendors of the condemned drugs or medicines.

In reply, I have the honor to state:

1. I am of the opinion that if the proposed sale otherwise presents a case of Federal commerce coming within [548] the provisions of the Food and Drugs Act, and not merely a case of purchase and sale in State commerce to which the Food and Drugs Act would have no application, the provisions of that act would apply even although the sale were made by officers of the Government under the provision of the Revised Statutes.

Revised Statutes, section 1241, provides that:

The President may cause to be sold any military stores which, upon proper inspection or survey, appear to be damaged, or unsuitable for the public service. Such inspection or survey shall be made by the officers designated by the Secretary of War, and the sales shall be made under regulations prescribed by him.

Section 2 of the Food and Drugs Act (34 Stat. 768), provides that—

Any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded food or drugs, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor, and for such offense be fined not exceeding two hundred dollars for the first offense, and upon conviction for each subsequent offense not exceeding three hundred dollars or be imprisoned not exceeding one year, or both, in the discretion of the court.

This act is broad in its terms, without any exception in favor of the Government or its officers, and includes generally "any person" who shall ship, deliver, sell, or offer to sell, adulterated or misbranded food or drugs in violation of its provisions.

[549] While it is a well-settled principle of statutory construction that a general prohibition contained in a statute does not ordinarily extend to or affect the sovereign, yet, as stated in an opinion which I rendered the Secretary of the Treasury on January 2 last, citing the language of Mr. Justice Story in *United States v. Hoar* (2 Mason, 311, Fed. Cas. 15373), the Government is to be regarded as included within such prohibition when either the nature of the mischiefs to be redressed or the language used shows that this was in the contemplation of the legislature. This is generally the case where the statute "is made for the public good, as for the advancement of religion and justice, or to prevent injury and wrong." (*United States v. Knight*, 14 Pet. 301, 315; *United States v. Herron*, 20 Wall. 251, 255; 8 Bacon's Abridgement by Bouvier, 92, Tit. "Prerogative," E. 5.)

The mischiefs to be redressed by the Food and Drugs Act are shown by its title, which reads: "An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, medicines, and liquors, and for regulating traffic therein, and for other purposes." As I have heretofore

said, its primary purpose "is to protect against fraud consumers of food or drugs" (26 Op., 219). Clearly, if adulterated or misbranded food or drugs were sold by the Government or its officers the purpose of the statute would be as much defeated and the injury to the consumer as great as if such articles were sold by private individuals. Furthermore, the theory that Congress intended that the Government itself might sell adulterated or misbranded drugs under circumstances when a sale by individuals was forbidden would involve an inconsistency which undoubtedly was not intended by the legislature. I, therefore, am clearly of the opinion that a sale by Government officers under Revised Statutes, section 1241, is as much subject to the provisions of the Food and Drugs Act as a sale by a private person would be under similar circumstances.

2. Whether, if these drugs and medicines are sold and delivered under circumstances otherwise coming within the [550] Food and Drugs Act, it would be a sufficient compliance with that act to label each original package with a statement that it contains deteriorated military supplies, condemned and sold under section 1241 of the Revised Statutes, would depend upon the precise facts.

The following provisions of the Food and Drugs Act are applicable to the case of deteriorated drugs:

Section 7 provides that drugs shall be deemed to be adulterated in the following cases:

First. If, when a drug is sold under or by a name recognized in the United States Pharmacopœia or National Formulary, it differs from the standard of strength, quality, or purity, as determined by the test laid down in the United States Pharmacopœia or National Formulary official at the time of investigation: *Provided*, That no drug defined in the United States Pharmacopœia or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality, or purity be plainly stated upon the bottle, box, or other container thereof although the standard may differ from that determined by the test laid down in the United States Pharmacopœia or National Formulary.

Second. If its strength or purity fall below the professed standard or quality under which it is sold.

Section 8 provides that drugs shall be deemed to be misbranded "the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular."

It does not appear from your letter what portion, if any, of these drugs are sold under names recognized in the United States Pharmacopœia, or whether the "original packages" to which you refer are the bottles, boxes, or other containers of the drugs in the form in which they are prepared for sale to the consumer, or are larger packages containing several of such bottles or boxes.

I am of the opinion that where a drug is not sold under a name recognized in the United States Pharmacopœia a general statement on the label such as that suggested, showing that its quality has deteriorated and that it has [551] been condemned for sale, would be a sufficient compliance with the law, as this would on its face correct any statement on the original label which might otherwise be misleading as to the quality, and would show that it was not sold under any professed standard, so that it could not then be deemed either adulterated under the second clause of section 7 or misbranded under section 8.

However, in case of a drug sold under a name recognized by the United States Pharmacopœia, I am of the opinion that a mere general statement of this character, showing only the fact of its deterioration, is insufficient, and that, in order that a drug sold under such name may not be deemed adulterated, it is necessary under the proviso contained in the first clause of section 7 that the actual standard of strength, quality, or purity should be stated.

I am further of the opinion, without passing upon the question as to what constitutes an original package within the meaning of section 2 of the act, that, so far as correcting any statement on the original label is concerned, it would not be sufficient to make such correction merely upon the label on the outer envelope of a package holding several bottles, boxes, or other containers of the drugs, but that the correction must be made upon the label of each bottle, box, or other container in which the goods are intended to reach the consumer, since evidently a statement of the true standard upon the covering of a package containing several bottles or boxes would be entirely valueless as a protection to the purchaser, and, being thrown away before the drug reached the consumer, would enable each bottle or box to be sold without any notice of its inferiority.

3. I am further of the opinion that the proposed sale could, however, in no respect affect the original makers or vendors from whom these supplies were purchased before the passage of the Food and Drugs Act, unaccompanied by any guaranty under that act, and at a time previous to their deterioration.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF WAR.

A RULE OR REGULATION REQUIRING THE NAME OF THE PARENT SUBSTANCE TO FOLLOW THAT OF A DERIVATIVE ON THE LABEL OF A DRUG WOULD BE WITHIN THE POWERS CONFERRED BY SECTION 3 OF THE FOOD AND DRUGS ACT, ON THE SECRETARIES OF THE TREASURY, AGRICULTURE, AND COMMERCE AND LABOR.¹

[143] DEPARTMENT OF JUSTICE,
January 15, 1909.

SIR: I have the honor to acknowledge the receipt of your letters of November 23, 1907, and December 14, 1908, in which you ask my opinion upon two questions, namely:

1. Is acetphenetidine a derivative of acetanilide, within the meaning of section 8 of the Food and Drugs Act?

[144] 2. If acetphenetidine be held to be such a derivative of acetanilide, is it sufficient to declare it on labels merely as acetphenetidine, or must it be stated to be a derivative of acetanilide?

From the papers transmitted and such further information as I have received from your department, I understand that the Secre-

¹ 27 Op. Atty. Gen. 143. See Regulation 28, p. 26, *ante*, and *United States v. The Antikamnia Chemical Co.*, p. 684, *ante*.

taries of the Treasury, Agriculture, and Commerce and Labor, in rule 28, promulgated by them under section 3 of the Food and Drugs Act (34 Stat. 768), designated acetphenetidine as one of the derivatives of acetanilide; and that the Secretary of Agriculture, on March 13, 1907, ruled that the name which should be employed in stating the quantity or proportion of the ingredients required by the act to be stated on the labels in the case of derivatives, should be the trade name of the derivative, accompanied by the name of the parent substance used in the act; that is to say, acetphenetidine should be labeled "acetphenetidine (derivative of acetanilide)" or words to that effect.

We must consider, in the first place, whether the regulation adopted by the three Secretaries is conclusive of the first question, in so far as it designates acetphenetidine as a derivative of acetanilide. Section 3 of the Food and Drugs Act provides that the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this act, etc. I do not think that it was intended by this section to confer absolute power upon the three Secretaries to determine what particular drugs are derivatives of those mentioned in section 8, subsection 2, with reference to drugs. In my opinion, it was only intended by section 3 to confer upon those Secretaries the power to adopt such rules and regulations as are appropriate to secure the enforcement of the act, and not to vest in them any judicial powers to determine when the act of a manufacturer or dealer in drugs or foods constitutes an offense under the statute. If the statute could be so construed, I should entertain serious doubt as to its constitutionality. It appears to me, therefore, that the first question which you submit is essentially one of fact to be determined, in the first instance, by yourself, and, in the event of judicial proceedings based upon your determination, by the appropriate tribunal (court or jury, according to circumstances) called to pass finally upon issues of fact joined in such proceedings. The papers submitted with your letters show, moreover, that the question is not merely one of fact, but a question of fact very earnestly controverted. It is, of course, evident that this department is neither required nor qualified to give an opinion as to such a question. Nevertheless, deeming it appropriate to afford you any possible assistance which it may be within the province of this department to furnish, I proceed to give you my opinion as to a question of statutory construction and, therefore, of law, which may be, and appears from some of the papers to be, in fact, involved in the question whether acetphenetidine is a derivative of acetanilide; that is to say, the meaning of the word "derivative" as used in section 8 of the Food and Drugs Act.

It is claimed by the manufacturers of acetphenetidine, in the documents submitted on their behalf, that a derivative, as used in the act, means substantially a product, and that unless it can be shown that the acetphenetidine which they manufacture is, in fact, produced by the use of acetanilide or, at all events, that such is the normal process whereby acetphenetidine is made, their goods cannot be described, with propriety, as a "derivative" of acetanilide. In support of this contention they refer to the cases of *Pickhardt v. United States* (99 Fed. 719) and *Farbenfabriken of Elberfeld & Co. v. United States*

(102 Fed. 603). In the last mentioned case (which was the same as the former appeal) the Circuit Court of Appeals said (p. 605) :

There is little room for the claim that, if the word "derived" is to have its ordinary meaning, coal-tar dyes not made from anthracene or from madder are in the free list. It is, however, said in the *Pickhardt* case that while the dyes in that case were not a product of anthracene, they were "derived" from anthracene, "in the chemical sense of having anthracene as a base, or responding to the chemical tests for anthracene." For example, Prof. Chandler, [146] recognized everywhere as an accurate and learned chemist, says that, to a chemist, the term "derived from" signifies that the body to which the term is applied bears a certain chemical relation to the one from which it is said to be derived; being a typical group of chemical atoms, which group, more or less modified, appears in every substance said to be derived from it.

The Court then stated:

It is not important to determine whether these dyes were derived from anthracene, in the chemical sense, for they were not a product of or made from anthracene; and the term "derived from" is to be understood in its commonly received and popular sense. "It is entirely well settled that, in the interpretation of the revenue laws, words are to be taken in their commonly received and popular sense, or according to their commercial designation, if that differs from the ordinary understanding of the word." (*Lutz v. Magone*, 153 U. S. 105, 14 Sup. Ct. 777, 38 L. Ed. 651; *United States v. Fuel Co.*, 172 U. S. 339, 19 Sup. Ct. 200, 43 L. Ed. 469. It is obvious that the popular meaning of the term is the meaning given in lexicons, and which is obtained by transmission or produced from, and refers, in this case, to its physical origin.

In the decision of the Circuit Court, Townsend, D. J., says (99 Fed. 720) :

Counsel for the importers contends that these colors are dyes derived from anthracin, and that the word "derived" is here to be used in the chemical sense of having anthracin as a base or responding to the chemical tests for anthracin. * * * I am satisfied, from a careful examination of the evidence and of the exhaustive opinion of the board of general appraisers, that these contentions are not sufficiently proved. The importers have failed to show that the dyes in question were derived from alizarin or from anthracin as a source. They have failed to show that Congress intended that the term "derived" should be used in this connection in the technical or chemical sense, as distinguished from its ordinary sense.

I see no reason to question the authority of these decisions; but it is to be observed that, in the cases cited, the [147] courts were construing a provision of the tariff law. In my opinion to the Secretary of the Treasury on the marking and branding of distilled spirits as affected by the pure food law (26 Op. 474), I said (p. 481) :

The primary purpose of the pure-food law is to protect against fraud consumers of food or drugs; as an incident or secondary purpose, it seeks to prevent, or, at least, discourage, the use of deleterious substances for either purpose; but its first aim is to ensure, so far as possible, that the purchaser of an article of food or of a drug shall obtain nothing different from what he wishes and intends to buy. * * *

It is obvious that the purpose of this act, as thus defined, is an altogether different purpose from that of the provisions of law relating to internal revenue.

This is no less obvious with respect to laws relating to the tariff, and, although it is reasonable to suppose that the Congress may have used the participle "derived" in a customs law in its ordinary and popular sense of "produced," I think the substantive "derivative" in the second subsection of section 8 of the Food and Drugs Act may be reasonably, and, indeed, ought to be understood in its chemical sense. The said subsection provides that a drug shall be deemed to be misbranded, "If the package fail to bear a statement on the label

of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein."

I have reached this conclusion mainly for two reasons. The word itself is seldom used in its general and popular meaning, and is ordinarily employed in one or the other of certain technical senses relating habitually either to grammar, music, medicine, mathematics, or chemistry. Secondly, it is employed here only with respect to various drugs, and may be appropriately understood as those called upon to deal in drugs would naturally understand it. The chemical definition of "derivative" is thus given in Webster's International Dictionary:

A substance so related to another substance by modification or partial substitution as to be regarded as derived [148] from it; thus, the amido compounds are *derivatives* of ammonia, and the hydrocarbons are *derivatives* of methane, benzene, etc.

The corresponding definition of the verb "derive" is:

To obtain one substance from another by actual or *theoretical* substitution; as to *derive* an organic acid from its corresponding hydrocarbon.

Applying this definition to the subject-matter of discussion, I can answer your first question only by saying that, in my opinion, acetphenetidine is to be considered a "derivative" of acetanilide, if it is so related to the latter substance that it would be rightly regarded by recognized authorities in chemistry as obtained from the latter "by actual or theoretical substitution;" and it is not indispensable that it should be actually produced therefrom as a matter of fact.

Your second question requires a construction of the subsection of section 8 of the Food and Drugs Act, above quoted. This subsection establishes what may be called an artificial definition of misbranding, by providing that, in addition to certain other contingencies, a drug shall be deemed to be misbranded if the package fail to bear a statement on the label of the quantity or proportion of certain designated drugs, including acetanilide, "or any derivative * * * of any such substances contained therein." In my opinion to the President in regard to the labeling or branding of whiskey, I said, with respect to this statute: "According to the recognized canons of statutory construction, the language of its provisions must be interpreted with reference to and in harmony with this" (its) "primary general purpose;" and, as above stated, I found that such primary purpose was "to ensure, so far as possible, that the purchaser of an article of food or of a drug shall obtain nothing different from what he wishes and intends to buy." It seems clear that the Congress thought the purchasers of drugs might be materially influenced in their determination to buy or not to buy any particular drug by knowing what quantity or proportion of the substances designated in this subsection—all of them more or less poisonous in their nature—might be contained in each package sold; and we [149] must, therefore, so interpret this law as to give effect, if possible, to this purpose of the statute. If, however, the package contains something which is itself a derivative or preparation of one of the drugs enumerated, the trade or technical name which it bears may not, and generally would not, indicate this fact; and the information intended by the Congress to

be conveyed to a purchaser by the label would surely not be conveyed by merely marking it 100 per centum of the article in question. Supposing, for the sake of illustration, but only for such purpose, that acetphenetidine is decided to be a derivative of acetanilide, no information to this effect would be given to one having no special knowledge of chemistry by marking the package "100 per cent acetphenetidine."

I am therefore of the opinion that a rule or regulation requiring the name of the parent substance to follow that of the derivative would be in harmony with the general purpose of the act, and an appropriate method by which to give effect to its provisions. In the absence, however, of a regulation to this effect, I do not think you can hold a package misbranded because the name of the parent substance does not follow that of the derivative, for it would certainly be a harsh construction of a penal provision such as this to hold that the package and its owner shall incur the grave consequences of misbranding under the statute because of this omission, since there is nothing in the law itself to inform the said owner that such omission would constitute an offense. In the language of Mr. Justice Brewer in *Railway Company v. Dey* (35 Fed. 876) :

No penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it ;

or, as is said by the same justice in *Tozer v. United States* (52 Fed. 919) :

In order to constitute a crime, the act must be one of which the public is able to know in advance whether it is criminal or not.

The subject appears to me one eminently appropriate for regulation by the three Secretaries under the power conferred upon them by section 3 of the act, since it seems [150] plain that the method of designating the derivative or preparation is one of those matters properly to be determined by a general rule applicable to all such cases; the purpose of section 3 being to enable the three Secretaries to specialize, for practical purposes, the general language of the act, so as to adapt it to the circumstances of particular cases arising in its enforcement. Until such action shall be taken it would seem that the effective enforcement of this provision with respect to "derivatives" or "preparations" will be virtually impracticable.

In answer to your second question, therefore, I advise you that a rule or regulation requiring the name of the parent substance to follow that of the derivative would be within the power of the board constituted by section 3 of the act; but that, in the absence of such a rule, no offense would be committed, under the act, by the omission of the name of the parent substance, nor could the article in such case be dealt with as misbranded for that reason alone.

I remain, sir, yours, very respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF AGRICULTURE.

THE LABELING OF WHISKY.¹

[202] DEPARTMENT OF JUSTICE,
February 19, 1909.

SIR: I have the honor to return you herewith the communication from Dr. F. L. Dunlap, associate chemist of the Department of Agriculture, to the Secretary of Agriculture, referred to me by you, and, in accordance with your request for an expression of opinion as to the views therein contained, I submit the following observations. Doctor Dunlap says:

Under the pure-food law, as administered now, neutral spirits, diluted to proper strength and colored with caramel, must be marked "imitation whisky." The spirit distillers request that this name be not forced upon them, but that they may use in its place one of the three names, "neutral whisky," "rectified whisky," or "redistilled whisky." * * *

It is my opinion that the term "whisky" should not be denied to neutral spirits diluted with water to a proper strength and colored with caramel. I believe that the use of the term "whisky" on such a product should be qualified with some term which will carry notice to the consumer of the nature of the product. For this purpose the terms [203] "neutral whisky," "redistilled whisky," and "rectified whisky" have been suggested.

On April 10, 1907, I gave you an opinion on the question of labeling whisky under the pure-food law in which I said (26 Op. 228):

The definition of "whisky" as a natural spirit involves as its corollary that there *can* be such a thing as "imitation whisky." If the same process were followed of which we spoke in connection with artificial wine, namely, if ethyl alcohol, either pure or mixed with distilled water were given, by the addition of harmless coloring and flavoring substances, the appearance and flavor of whisky, it is impossible to find any other name for the product, in conformity with the pure-food law, than "imitation whisky."

Having, by your direction, given a public hearing to various persons dissatisfied with your rulings in accordance with the foregoing opinion, and having fully considered the matter in all aspects, I gave you, on May 29, 1907, another opinion, in which I said, referring to my opinion of April 10 (26 Op. 263):

I find no reason to withdraw the said opinion or to modify it in any respect, and I respectfully report that, in my judgment, this opinion correctly states the law on the subject to which it relates.

and added (ib. 266):

It was developed at the hearing before me that some, at least, of the dealers in whisky who questioned the correctness of my opinion claimed that ethyl alcohol and whisky are not merely "like," but identical; that whisky is ethyl alcohol, and ethyl alcohol is whisky. Their argument was, in substance, that ethyl alcohol was whisky from which certain congeneric substances, termed by them "impurities," had been removed; and whisky was ethyl alcohol in which these "impurities" had been allowed to remain, or to which some substitute for them had been added. Now it is obvious that "impurities" is a question-begging term, and if it is admitted that substances so designated are really congeneric with the whisky it is an illogical and [204] therefore an inappropriate designation. Pearls in an oyster may be the result of disease or injury to the animal, but when we speak of "pearl-bearing oysters" they constitute a very important portion of the idea thus expressed. If the so-called "impurities" are an essential part of whisky, or, in other words, if, in the language of the definition of the Department of Agriculture, they "give character to the distillate," then it is as inaccurate to describe a substance destitute of them

¹ 27 Op. Atty. Gen. 202. See also F. I. D. 45, 65, 95, 98, 113, 118, and 127, pp. 36, 51, 110, 113, 129, 133, and 139, *ante*; Opinions of the Attorneys General, pp. 775 and 783, *ante*; Report of the Solicitor General, p. 818, *post*; and Decision of the President, p. 831, *post*.

as "purified" or "rectified" whisky as it would be to speak of sugar and water as "lemonade without lemons."

It seems obvious, from the juxtaposition of these extracts from my two opinions and those from Doctor Dunlap's letter, that the assistant chemist of the Department of Agriculture suggests that, on the question of the construction of a statute, a very carefully considered and reconsidered opinion of the Attorney General should be disregarded. He bases this recommendation upon certain conclusions which he says have been reached by the English "Royal Commission on Whisky and other potable spirits," in what it described as an "Interim Report." He describes this commission as composed of "eminent scientific men," but it does not appear from his letter that the said commission consists of lawyers or that they have had under consideration the construction of the act of Congress generally known as the pure-food law. I am therefore unable to recognize their conclusions as entitled to weight in determining the above-mentioned question of statutory construction; and I may add that I am unable to see how these conclusions, in so far as stated by Doctor Dunlap, have any bearing upon the question considered in my two opinions. He states these conclusions as follows:

1. That no restriction should be placed upon the process of, or apparatus used in, the distillation of any spirit to which the term "whisky" may be applied as a trade description.

2. That the name "whisky," having been recognized in the past as applied to a potable spirit manufactured from (1) malt, or (2) malt and unadulterated barley or other [205] cereals, the application of the term "whisky" should not be denied to the product manufactured from such materials.

It appears to me that these "eminent scientific men," in these conclusions, make suggestions as to what legislation on the subject should contain, and do not assume to construe legislation already enacted; and especially do not express any opinion as to the construction of an American law dealing with American conditions.

Inasmuch, however, as I can not fail to recognize in Doctor Dunlap's recommendation a challenge of the correctness of my conclusions as announced in the two opinions heretofore rendered you, I think it is but proper that I should call your attention to certain judicial decisions rendered upon the question discussed in his letter subsequently to the date of the said two opinions. In the case of *Levy v. Uri* (31 D. C. App. 441), the Court of Appeals of the District of Columbia, speaking by Mr. Justice Robb, says on this question:

Each kind of whisky mentioned has its own peculiar flavor and character and is sought after as a beverage because of that flavor and character. Neutral spirits, on the contrary, as the term suggests, is a colorless liquid, has neither flavor nor character, and is not a beverage at all. It may be produced from any fermented substance, such as corn, potatoes, and sugar beets. Formerly it was used exclusively in the arts, but with the advent of cheaper methods of production it has been palmed off on the public as a beverage by mixing it with something to give it flavor and character. Since it costs far less to produce than rye whisky, it is apparent that its use by the distiller increases his profits in proportion as the public is deceived. * * *

As before stated, neutral spirits is not a beverage, has none of the characteristics of rye whisky, and is, therefore, "matter of another kind."

In that case it was decided that the use of a label describing a mixture of neutral spirits and whisky as "whisky" only, constituted

a fraud on the public, and that such a label would not be protected and could not be legally registered as a trade-mark.

[206] In the case of *Union Distilling Company et al. v. Bettman* (T. D. Int. Rev., vol. 11, p. 120), in the Circuit Court of the United States for the Southern District of Ohio, the court (Thompson, D. J.) says:

The question presented is whether natural spirits reduced to potable proof and artificially colored and flavored is whisky or only an imitation of whisky. * * *

The affidavits of the complainants do not show that the people—the consumers—were ever advised or knew that complainants' product branded "whisky" was in fact alcohol artificially colored and flavored, and affidavits submitted by the defendants, seven of wholesalers and ten of retailers in Washington and Cincinnati, do show that no wholesaler or rectifier ever offered to sell to them "as whisky a product which such wholesaler or rectifier represented to be alcohol colored or flavored," and that they "would not knowingly purchase as whisky such a product." * * *

The fact that this practice has been long continued does not establish a right which the court would protect. It misbrands the product in violation of the Food and Drugs Act and of section 3449 of the Revised Statutes of the United States, if that section is applicable to the case. (76 Fed. 367.) It does not truthfully designate "the *kind and quality* of the contents of the casks or packages," as required by section 3449. The product is not genuine whisky, in the making of which age modifies objectionable elements and develops the flavor which pleases the taste and adds so much to its value. It should be branded "imitation whisky."

In the case of *Woolner v. Rennick* (170 Fed. 662), in the Circuit Court of the United States for the Southern District of Illinois, the court says:

That there is a product called *whisky* and also a product called *imitation whisky* the law itself clearly contemplates, and section 3244, in defining what is meant by the business of rectifying, denominates the maker of imitation whisky and other imitation liquors as a rectifier. * * *

[207] The convincing weight of testimony on this subject, given by such men as Professors Frear, of Pennsylvania; Scovill, of Kentucky; Tolman and Adams, of Washington, D. C.; Shepherd, of South Dakota; Jenkins, of Maine; Fischer, of Wisconsin, and many other State analysts and chemists of repute, is to the effect that neutral spirits reduced by water to potable strength, from which most of the fusel oil has been removed, is not a like substance with whisky. * * *

The record also shows that diluted spirits treated with artificial coloring matter and essences are not sold to the trade as such, but are always presented under such labels, terms, and descriptions as import age and maturity, and which the consumer identifies with the genuine product whisky. * * *

The fact that this practice had, to some extent, prevailed for many years does not show in the complainants any right which the court should protect. It shows, rather, that the Commissioner of Internal Revenue has been tardy in promulgating a regulation which he had legal power to enforce, even before Congress gave emphasis to the subject by the enactment of the Food and Drugs Act.

A decision understood to be the same in effect has been rendered in the Circuit Court of the United States for the District of Maryland, by Morris, D. J., but I have no copy of the opinion.

It thus appears that the correctness of the conclusions reached by this department in the two opinions to which I have referred has been tested in at least four decisions by competent courts upon the precise question discussed in Doctor Dunlap's letter; and the decision in every instance has been that what he advises is forbidden by the true construction of the pure-food law. So far as I am aware

there has been no decision by any court to the contrary. It would be undoubtedly highly appropriate that a final determination of the question should be obtained from a court of last resort, and I have every reason to think that such a determination will be obtained in some one of the suits above mentioned, or in another proceeding. [208] Should this determination show that this department erred in its conclusions embodied in the two opinions heretofore rendered you on this subject, a change in the administration of the pure-food law will of course become proper. At present, however, in so far as informed by the decisions heretofore made on this question, I can only advise you that the conclusions announced in the opinions of April 10 and May 29, 1907, are sound, and that to give effect to Doctor Dunlap's suggestions would be to violate the pure-food law.

Yours, very respectfully,

CHARLES J. BONAPARTE.

THE PRESIDENT.

MEATS AND MEAT-FOOD PRODUCTS PREPARED FOR INTERSTATE OR FOREIGN COMMERCE UNDER THE MEAT-INSPECTION LAW OF JUNE 30, 1906 (34 STAT. 674), ARE SUBJECT TO THE PROVISIONS OF THE FOOD AND DRUGS ACT OF JUNE 30, 1906 (34 STAT. 768).¹

[164] DEPARTMENT OF JUSTICE,
May 24, 1913.

SIR: I have your letter of the 3d instant requesting my opinion on the following question:

Are the provisions of the Food and Drugs Act, June 30, 1906 (34 Stat. 768), applicable to meats and meat-food products prepared for interstate or foreign commerce under the meat-inspection law, June 30, 1906 (34 Stat. 674)?

The question arises in your department by reason of the fact that rule 39 of the rules and regulations made by the Secretaries of the Treasury, Agriculture, and of Commerce and Labor for the enforcement of the Food and Drugs Act provides that said regulations shall not apply to domestic meats and meat-food products which are prepared under the meat-inspection law, and that it is your intention, if your question shall be answered in the affirmative, to propose to the other Secretaries that said rule 39 be revoked.

I have carefully examined the opinion of the Solicitor of the Department of Agriculture, which you inclose for my information, and I agree with him that your question should be answered affirmatively.

[165] The agricultural appropriation act of June 30, 1906, contains some 22 paragraphs, which are commonly called the meat-inspection amendment. These paragraphs begin:

That for the purpose of preventing the use in interstate or foreign commerce, as hereinafter provided, of meat and meat-food products which are unsound, unhealthful, unwholesome, or otherwise unfit for human food, etc.

On the same day was approved another statute which is popularly known as the Food and Drugs Act.

¹ 30 Op. Atty. Gen. 164. See also opinion of the Attorney General, dated Sept. 27, 1906, p. 768, *ante*; and F. I. D. 151, p. 159, *ante*.

Both statutes had the common purpose of preventing the shipment in interstate and foreign commerce of impure or unwholesome foods.

The first act is limited to meats and meat-food products, while the second act is general and covers all foods and drugs. While they have a common object, their method of accomplishing that purpose is quite different.

The consensus of opinion among scientists is that it is practically impossible to judge by an examination of a piece of meat, whether or not it came from a diseased animal, but that such fact can only be determined by a post-mortem examination of the carcass of the animal itself. Accordingly, the meat-inspection act prohibits the interstate transportation of meat, unless there has been a post-mortem examination of the animals from which such meat comes and a finding by the official inspectors that the animals were free from disease, and the meat is sound, healthful, wholesome, and fit for human food. The whole structure of this statute is addressed to securing an inspection of the animal from the time it enters the slaughterhouse practically until the meat-food products reach the hands of the retailer, and this purpose is accomplished by forbidding and making criminal the interstate transportation of all meat which does not bear the Federal mark of inspection and approval. So far as this statute is concerned, the prerequisite of the lawful transportation of the meat is the Federal inspection and approval, and the crime exists even though the meat transported be perfectly sound and wholesome, if it has not in fact been inspected and approved.

[166] The act applies only to cattle, sheep, swine, and goats, and poultry is not inspected under it; it is enforced only by criminal action; it does not provide for the seizure of the meats themselves, nor does it reach meats which have become spoiled after leaving an official establishment, but which are still in interstate commerce.

The Food and Drugs Act, on the other hand, accomplishes its purpose, not by an inspection preliminary to transportation—for inasmuch as the act applies generally to all foods and drugs, such inspection would be practically impossible—but by making criminal the interstate commerce in adulterated or misbranded foods and drugs. Provision is made for collecting and analyzing samples of foods and drugs, and in addition to punishing violators of the law authority is given to seize and destroy the adulterated or misbranded foods themselves.

While these two statutes overlap to some extent, neither is inconsistent with the other, nor is anything contained in them to indicate that either was intended by Congress as a substitute for the other. I am of the opinion that the acts are supplementary to each other, and that both apply to the same articles of food wherever their language so indicates.

That the Food and Drugs Act applies to meats and meat-food products is clear from its language. For instance, in section 6, it is said:

The term "food," as used herein, shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound.

Section 7 provides that, for the purposes of the act, an article shall be deemed to be adulterated, in the case of food:

Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter.

Respectfully,

J. C. McREYNOLDS.

To the SECRETARY OF AGRICULTURE.

THE SECRETARIES OF THE TREASURY, AGRICULTURE, AND COMMERCE AND LABOR ARE RESTRICTED TO THE MAKING OF RULES AND REGULATIONS FOR CARRYING OUT THE PROVISIONS OF THE FOOD AND DRUGS ACT, AND HAVE NO AUTHORITY TO REVIEW FINDINGS OF FACT AND REPORTS MADE TO THE SECRETARY OF AGRICULTURE.¹

[494] DEPARTMENT OF JUSTICE,
July 8, 1912.

SIRS: I beg to acknowledge the receipt of your letter of the 14th of May, propounding certain questions which have arisen in the enforcement of the Food and Drugs Act of June 30, 1906 (34 Stat., 768).

You state that the Referee Board of Consulting Scientific Experts of the Department of Agriculture has lately completed an investigation on the use in foods of copper salts, "the results of which investigation show that foods containing copper salts are adulterated under the Food and Drugs Act, and articles greened with copper salts must therefore be refused entry into the United States and excluded from interstate commerce."

You then state that doubts have arisen whether the announcement of the conclusions of the board shall be [495] made by the three Secretaries in conformity with the practice which has existed heretofore, or by the Secretary of Agriculture alone, and I am specifically asked:

1. Are the three Secretaries restricted to the making of rules and regulations, or have they any authority to review findings of fact and reports made to the Secretary of Agriculture?

2. If the findings of fact and reports have been approved, should the three Secretaries participate in the announcement, or does the law contemplate that the announcement shall be made by the Secretary of Agriculture alone?

Section 3 of the Food and Drugs Act provides that the three Secretaries "shall make uniform rules and regulations for carrying out the provisions of this act."

Under the provisions of section 4 the examination of specimens of foods and drugs collected under the rules made by the three Secretaries is to be made in the Bureau of Chemistry of the Department of Agriculture or under the direction and supervision of that bureau; if such examination shows a violation of the law, a hearing is given to the party from whom the sample was obtained. Regulation 5 pro-

¹ 29 Op. Atty. Gen., 494.

vides that this hearing may be had before the Secretary of Agriculture, or such other official connected with the food and drug inspection service as may be commissioned by him for that purpose. In practice I understand the hearing is had before the Board of Food and Drug Inspection in Washington, or such officer of the Bureau of Chemistry throughout the country as may be most convenient in each case.

Under the provisions of sections 4 and 5 of the act, when it is made to appear on such hearing that the law has been violated, the papers are to be certified by the Secretary of Agriculture to the proper officer of this department for prosecution.

By section 11, in the case of imports the Secretary of the Treasury is to deliver samples to the Secretary of Agriculture, upon the latter's request, and opportunity for a hearing before the Secretary of Agriculture is to be accorded to the owner or consignee. If it appears from such examination that such articles are adulterated or misbranded, then they are refused admission into this country.

[496] It clearly appears from this brief statement that the direct and active enforcement of the statute is cast upon the Department of Agriculture and upon that department alone. The sole duty of the three Secretaries in connection with the law is the making of rules and regulations for carrying out its provisions.

With this understanding of the law, I think the answer to your questions is plain.

The referee board was established by the Secretary of Agriculture and is a board of his department. By letter to me of March 23, 1909, the Secretary stated that the members of the board are charged with the duty of considering and reporting to him upon the wholesomeness or the deleterious character of such foods, or articles used in foods, as might be referred to them, their sole function being to investigate and report (27 Op., 300-305).

This board has, at the direction of the Secretary of Agriculture, investigated the effect of copper salts as a preservative of foods and has reported that copper salts are an added deleterious ingredient, which may render injurious to health the articles to which added.

I understand that in similar investigations made by this board the report has been submitted to the three Secretaries, and, if approved by them, a rule has been promulgated to the effect that the preservative investigated will, or will not, constitute an adulteration, as the case may be.

I take it that such rules have been made under a misapprehension of the true meaning of the statute. I understand that the finding of the referee board is not conclusive upon the courts should the question of the correctness of such finding properly arise in a case. On the contrary, I understand that the report of the referee board is no more than the statement of the board in each case that, in the opinion of the eminent chemists composing it, the use of the preservative in question is, or is not, deleterious to the human system.

This report is not binding upon the Secretary of Agriculture, but is simply for his information and guidance. Should he approve the finding of the board, and so announce to the public. I understand that this announcement [497] is merely a statement that in the subsequent examinations of samples of foods collected under the Food and Drugs Act the decision thus made will be followed. To take the

present case as an illustration, it is a statement to the public that the Department of Agriculture regards the addition of copper salts to articles of food as an adulteration and will report all such cases to this department for prosecution.

I am, therefore, of the opinion that the three Secretaries are restricted to the making of rules and regulations and have no authority to review findings of fact and reports made to the Secretary of Agriculture.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARIES OF THE TREASURY, OF AGRICULTURE, and of COMMERCE AND LABOR.

UNDER THE AMENDMENT OF MARCH 3, 1913, THE TOLERANCES TO BE ESTABLISHED BY RULES AND REGULATIONS INCLUDE LARGE PACKAGES.¹

[222] DEPARTMENT OF JUSTICE,
August 26, 1913.

SIR: Your question submitted to me by your letter of the 11th instant in regard to the amendment of March 3, 1913 (37 Stat. 732), to paragraph third of section 8 of the Food and Drugs Act of June 30, 1906 (34 Stat. 768), is one peculiarly requiring the rule that a construction of a statute shall not stick in the letter, but shall conform to the true spirit and intent of the act, if that can in any way be gathered from its language.

The amended act provides that an article shall be deemed to be misbranded in the case of food:

Third. If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count: *Provided, however,* That reasonable variations shall [223] be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of section three of this act.

It is claimed that owing to the absence of a comma after the words "tolerances" and "packages" the rules and regulations provided for may only establish tolerances and exemptions as to *small packages*. This construction, however, in my judgment, would not conform to the plain intent of the act. It is evident that "tolerances" are just as necessary in the case of large packages as in the case of small. Indeed, there would seem to be little room for tolerances in the case of small packages. As to them, exemption would be the natural remedy for the strictness of the act. I therefore read the statute in this wise:

Provided, however, That reasonable variations shall be permitted by rules and regulations made in accordance with the provisions of section three of this act, and tolerances, and also exemptions as to small packages, shall be established by like rules and regulations.

That is, administrative variations are to be promulgated specifically defining (1) reasonable variations, (2) tolerances as to large pack-

¹ 30 Op. Atty. Gen., 222.

ages, (3) exemptions as to small, the line between large and small packages to be determined by the three Secretaries.

This view is borne out by the legislative history of the act. The act as originally introduced in the House (H. R. 22526) stated the proviso of the third paragraph as follows (Cong. Rec., 62nd Cong., 2nd Sess., p. 10235) :

Provided, however, That reasonable variations shall be permitted, and tolerances shall be established by rules and regulations made in accordance with the provisions of this act, which shall not in the average reduce the weight, measure, or numerical count below that marked on said package.

This proviso, like that in the approved act, may be construed to provide for rules and regulations as to reasonable variations, and as to tolerances for all packages, large and small, but contains no provisions as to exemptions.

The Senate amended the proviso in question so as to read as follows (Cong. Rec., 62nd Cong., 3rd Sess., p. 3503) :

[224] *Provided, however,* That the Secretary of Agriculture is authorized to establish rules and regulations permitting reasonable variations where in his judgment exactness is impracticable, and shall keep a record thereof: *Provided further, That the provisions of this paragraph shall not apply to articles in packages or containers when the retail price of such articles is six cents or less.*

The Senate amendment, it will be noted, provides for rules and regulations permitting reasonable variations generally, and expressly exempts small packages, but contains no provision as to tolerances.

The conference recommended as a compromise the act in its present form (Cong. Rec., 62nd Cong., 3rd Sess., p. 4559), and the conference reports were agreed to.

The differences between the two Houses compromised by the approved act were these. The House wanted rules and regulations as to both reasonable variations and tolerances, but did not desire exemptions. The Senate wanted exemptions as to small packages and regulations only as to reasonable variations. The approved act retained the House provision as to regulations for both reasonable variations and tolerances, and modified the Senate provision as to exemptions by making them also the subject of rules and regulations instead of granting them as a matter of law. I have the honor to be,

Your obedient servant,

J. C. McREYNOLDS.

To the SECRETARY OF AGRICULTURE.

APPENDIX.

LEGISLATIVE HISTORY OF FOOD AND DRUGS ACT.

An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes. (Food and Drugs Act.) Act of June 30, 1906, c. 3915, 34 Stat. 768. (Fifty-ninth Congress, first session, S. 88.)

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- Senate report No. 8, 59th Cong., 1st session.
- House report No. 2118, 59th Cong., 1st session, p. 807, *post*.
- House report No. 2118, part 2. (Minority report.)
- House report No. 5056, 59th Cong., 1st session.
- House report No. 5096, 59th Cong., 1st session.

¹ Page numbers refer to bound volumes of Congressional Record.

PURE FOOD.¹

The Committee on Interstate and Foreign Commerce, to whom was referred the bills, H. R. 4527, 7018, 12071, 13859, and S. 88, beg leave to report and recommend that the said House bills be laid on the table.

H. R. 4527 is the bill known as the "Hepburn pure-food bill," and is similar to the bill which was reported to the House on January 18, 1904, and which was passed by the House.

Your committee has perfected the Hepburn bill by various amendments and recommends that Senate bill 88 be amended by striking out all after the enacting clause and substituting the Hepburn bill as perfected by the committee. The perfected Hepburn bill, offered as a substitute for the Senate bill, is set forth in full at the end of this report.

The bill as recommended for passage proposes to regulate to a certain extent the traffic in drugs and foods in the District of Columbia, in the Territories, and insular possessions, also when imported into the United States or intended for export, and in interstate commerce, under rules and regulations to be made in accordance with the provisions of the bill by the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor.

It forbids the importation, or the shipment from one State to another, or the offering for sale in the District of Columbia and the Territories of articles declared by the act to be adulterated or misbranded.

DEFINITIONS.

It defines the term "drug" as including all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or animal. It defines the term "food" as including all articles used for food, drink, confectionery, or condiment by man or animal.

ADULTERATIONS.

It describes what shall be considered under the provisions of the act as adulterations, traffic in which is regulated or forbidden by the act.

ADULTERATION IN DRUGS.

It prescribes that a drug shall be considered as adulterated if when sold under the standard recognized in the United States Pharmacopœia or National Formulary it differs from the standard of strength, quality, or purity, as laid down therein, or if its strength or purity differ from any other professed standard or quality under which it is sold.

ADULTERATION IN CONFECTIONERY.

It prescribes that confectionery shall be deemed adulterated if it contain terra alba, barytes, talc, chrome yellow, or other mineral substance, or poisonous color or flavor, or other ingredient deleterious or detrimental to health.

ADULTERATION IN FOOD.

It prescribes that food shall be adulterated (including under the term both food, drink, and condiment):

First. If any substance has been mixed and packed with it so as to reduce or injuriously affect its quality or strength.

Second. If any substance has been substituted wholly or in part.

Third. If any valuable constituent has been abstracted wholly or in part.

Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

Fifth. If it contain any added poisonous or deleterious ingredient which may render such article injurious to health.

¹ House of Representatives, report No. 2118, 59th Cong., 1st sess., to accompany S. 88. This is the report of the majority of the committee. The minority report is not included in this compilation.

Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, or if it is the product of a diseased animal or one that has died otherwise than by slaughter.

MISBRANDED.

It provides that articles covered by the act shall be deemed "misbranded" when the package or label shall bear any statement regarding the ingredients which shall be false or misleading in any particular, or which shall falsely state the State, Territory, or country where manufactured or produced. It further provides that a drug shall be deemed "misbranded" if it be an imitation of or offered for sale under the name of another article; or if the contents of the original package shall have been removed in whole or in part and other contents placed in the package; or if it fail to bear a statement on the label of the quantity or proportion of alcohol therein, or of any opium, cocaine, or other poisonous substance therein.

It provides that a food (or drink) shall be deemed misbranded:

First. If it be an imitation of, or offered for sale under the distinctive name of another article.

Second. If it be labeled or branded so as to deceive or mislead the purchaser or falsely purport to be a foreign product.

Third. If in package form the quantity of the contents of the package be not plainly and correctly stated in terms of weight or measure on the outside of the package.

Fourth. If the package containing it, or its label, shall bear any false or misleading statement, design, or device regarding the ingredients.

WHEN NOT ADULTERATED OR MISBRANDED.

It is provided, however, that an article of food shall not be considered adulterated or misbranded if it does not contain any added poisonous or deleterious ingredients in the following cases:

First. In the case of mixtures or compounds, known as articles of food under their own distinctive names and not an imitation of or offered for sale under the distinctive name of another article, provided the label or brand shall contain a statement where the article has been manufactured or produced.

Second. In the case of articles labeled, branded, or tagged, so as to plainly indicate that they are compounds, imitations, or blends. And in this connection the bill describes the word "blend" as used therein to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients. It is further provided that manufacturers of proprietary articles which contain no unwholesome added ingredient shall not be required to disclose their trade formulas except in so far as may be necessary to prevent adulteration or misbranding.

PROTECTION FOR RETAIL DEALERS.

As the principal purpose of the bill is to prevent interstate and foreign commerce in adulterated or falsely branded articles of food, drink, and medicine, the committee has inserted in the bill a provision intended to protect all persons dealing in the articles subsequent to the manufacturer or importing agent.

Section 8 of the bill provides that no dealer shall be convicted when he is able to prove a guaranty of conformity with the provisions of the act signed by the manufacturer or the party from whom he purchased. The section requires that the guarantor shall reside within the United States and that the guaranty shall contain his full name and address.

In other sections of the bill there are provisions for collecting samples or specimens and the examination of such in order to determine whether they are adulterated or misbranded, and the bill provides that any party from whom a sample was obtained shall be given an opportunity to be heard before the Secretary of Agriculture shall certify to the United States district attorney the results of an examination of the article as the basis for prosecution; so that if samples of goods shall be taken from a retail or wholesale dealer who has received a guaranty of conformity with the provisions of the act from the person who sold to him, he will be relieved from prosecution, and any penalty which may attach under the act will be directed to the original guarantor.

These carefully prepared provisions of the bill will prevent any dealer being put to the expense of a prosecution where he takes the precaution to protect himself by requiring a guaranty.

STANDARDS OF FOOD.

We realize that it is not possible for Congress to determine the wholesomeness or unwholesomeness of each food product, or to fix by legislative act the standard which shall be accepted as complying with well-known names of food articles. We realize that in the end the determination of the standard of a food article under a given name may be one to be settled by the courts. It is, however, essential to the success and operation of any pure-food measure that standards of food products shall be arrived at for the guidance of the officials charged with the administration of the law and often for the information of the courts.

One of the principal objects of a national pure-food law is to obtain uniformity of food standards among the States, which are supreme within their own borders. The intention of the makers of the Constitution and the founders of the Republic that commerce between the States should be free and unhampered has been largely nullified as to food products by the varying requirements as to standards and labels in different States. In one State one standard may be required for a named article and in the adjoining State a different standard fixed; and where the same standard is agreed upon in a group of States for precisely the same article different labels may be required in each of them, so that the producer or manufacturer is compelled to not only have complete knowledge of the various State laws, but under penalty is required to carefully see to it that a package of goods intended to meet the requirements of one State shall not by error be sent into another State. This has a tendency to prevent the development of small jobbing and wholesale cities, because the small jobber perhaps can not well afford to carry in stock what in fact is the same article properly labeled for a number of different States surrounding him.

It is therefore provided in the bill that the Secretary of Agriculture shall fix the standard of food products when advisable, and that to aid him in reaching just decisions he is authorized to call upon the committee on food standards of the Association of Official Agricultural Chemists and the committee of standards of the Association of State Dairy and Food Departments, and such other experts as he may deem necessary.

PRESERVATIVES.

The use of preservatives in some form and to some extent has become well-nigh universal in our country as to certain classes of food products. It is contended by some that preservatives are injurious and unwholesome; by others that in small quantities they are harmless and necessary for proper preparation of food articles. It is contended by some that a preservative, when introduced into the human system, requires an extra and unusual amount of work on the part of the organs of the body to get rid of it, and that though a preservative in very small quantities may seem harmless, that, in fact, to the extent to which it exists, it is to a degree injurious to the system in the long run.

It is, of course, admitted that food must be preserved in some manner, and it is generally admitted that if food can not be preserved in any other manner than by the addition of small quantities of preservatives, such as boric acid, salicylic acid, benzoic acid, or similar substances, that it is better for mankind to suffer the injury caused by the preservative rather than to do without food which has been kept for a time. Some claim that food can be preserved in sufficient quantities and for a sufficient length of time without the use of these artificial preservatives.

Others claim that these preservatives are essential to the manufacture, keeping, and use of many articles of food. The question is one of tremendous importance. On the one hand, it affects the health of the whole community; on the other hand, it may determine the continuance of great business enterprises. No one desires to injuriously affect the health of the community in order to benefit a manufacturing interest, and no one desires to injure the manufacturing interest by forbidding the use of a preservative unless that preservative, in the amount used, is in fact injurious to the public health.

Your committee has not undertaken to determine the wholesomeness of preservatives. By the bill it is provided that before the Secretary of Agriculture shall make decision concerning the wholesomeness or unwholesomeness of a preservative or other substance which may be added to foods, any person interested may ask for the appointment of a special board for the purpose of considering the matter and advising the Secretary of Agriculture. It is provided that this board shall consist of 1 toxicologist, 1 physiological chemist, 1 bacteriologist, 1 pathologist, and 1 pharmacologist.

POLICE POWERS OF THE STATE NOT INTERFERED WITH.

It is expressly provided by the bill that it shall not be construed to interfere with commerce wholly internal in any State nor with the exercise of the police powers of the States, but foods and drugs fully complying with all the provisions of the act shall not be interfered with by the State authorities when brought from another State so long as they remain in original unbroken packages, except as may be otherwise defined by law or provided by the statutes of the United States.

NECESSITY FOR NATIONAL PURE-FOOD LAW.

The necessity for pure-food laws is apparent to everyone. Many of the States have endeavored to meet this necessity, so far as they can, within their own respective borders, but the several States have proven unable to fully deal with the matter when affected by interstate commerce in adulterated and misbranded articles. It is essential that there be some national legislation as an aid to State legislation against impure foods and drugs. Then, again, the laws and regulations of the different States are diverse, confusing, and often contradictory. What one State now requires the adjoining State may forbid. Our food products are not raised principally in the States of their consumption.

State boundary lines are unknown in our commerce, except by reason of local regulations and laws, such as State pure-food laws. It is desirable, as far as possible, that the commerce between the States be unhindered. One of the hoped-for good results of a national law on the subject of pure foods is the bringing about of a uniformity of laws and regulations on the part of the States within their own several borders. It is believed that the fixing of food standards through the aid, in part, of the State food officials in collaboration with the Agricultural Department will have the happy result of final uniform food standards and regulations in the different States.

VARIOUS BILLS INTRODUCED IN CONGRESS.

Legislation regarding interstate commerce in foods has been constantly before the Congress of the United States for about eighteen years. Senate bill No. 3991, introduced June 3, 1890, by Mr. Paddock, passed the Senate about fourteen years ago. Since then the following pure-food bills have been introduced in the Senate and the House:

SENATE BILLS.

No.	Date.	Introduced by—	No.	Date.	Introduced by—
3991	June 3, 1890	Mr. Paddock.	3796	Mar. 26, 1900	Mr. Jones.
1	Dec. 10, 1891	Do.	4047	Apr. 6, 1900	Mr. Foster.
1488	Jan. 11, 1892	Mr. Hiscock.	2426	Jan. 15, 1900	Mr. Mason.
2984	Apr. 22, 1892	Mr. Wilson.	5262	Dec. 18, 1900	Do.
3796	Jan. 30, 1893	Mr. Faulkner.	1347	Dec. 9, 1901	Do.
471	Mar. 18, 1897	Mr. Gallinger.	3015	Jan. 20, 1902	Do.
4015	Mar. 2, 1898	Mr. Faulkner.	2987	do.	Mr. Cullom.
4144	Mar. 16, 1898	Do.	3240	Jan. 27, 1902	Mr. Depew.
5375	Jan. 27, 1899	Mr. Thurston.	3342	Jan. 29, 1902	Mr. Hansbrough.
2048	Jan. 3, 1900	Mr. Allen.	6303	June 28, 1902	Mr. McCumber.
2049	do.	Do.	198	Nov. 11, 1903	Do.
2050	do.	Do.	88	Dec. 6, 1905	Mr. Heyburn.
2222	Jan. 8, 1900	Mr. Hansbrough.	3623	Jan. 24, 1906	Mr. Hopkins.
3618	Mar. 15, 1900	Mr. Proctor.			

HOUSE BILLS

No.	Date.	Introduced by—	No.	Date.	Introduced by—
283	Dec. 18, 1889	Mr. Conger.	276	Dec. 2, 1901	Mr. Sherman.
11297	July 8, 1890	Mr. Turner of Kansas.	3109	Dec. 6, 1901	Mr. Hepburn.
109	Jan. 5, 1892	Mr. Holman.	4342	Dec. 10, 1901	Mr. Kahn.
4438	Jan. 21, 1892	Mr. Smith of Illinois.	9351	Jan. 18, 1902	Mr. Warner.
8603	May 6, 1892	Mr. Meredith.	9352	Jan. 18, 1902	Mr. Mann.
11490	Jan. 9, 1899	Mr. Grout.	9960	Jan. 23, 1902	Mr. Sherman.
4618	Dec. 18, 1899	Mr. Babcock.	12348	Mar. 10, 1902	Mr. Corliss.
6442	Jan. 16, 1900	Mr. Glynn.	5077	Nov. 27, 1903	Mr. Hepburn.
7667	Jan. 30, 1900	Mr. Sherman.	6295	Dec. 8, 1903	Do.
5441	Dec. 18, 1897	Mr. Brosius.	6295	Jan. 21, 1904	Do.
9154	Mar. 15, 1898	Do.	4527	Dec. 6, 1905	Do.
2561	Dec. 7, 1891	Do.	7018	Dec. 13, 1905	Mr. Davidson.
6246	Jan. 15, 1900	Do.	12071	Jan. 16, 1906	Mr. Lorimer.
9677	Mar. 16, 1900	Do.	13859	Feb. 2, 1906	Mr. Rodenburg.
12973	Dec. 19, 1900	Do.			

PURE FOODS.

The purpose of the pending measure is not to compel people to consume particular kinds of foods. It is not to compel manufacturers to produce particular kinds or grades of food. One of the principal objects of the bill is to prohibit in the manufacture of foods intended for interstate commerce the addition of foreign substances poisonous or deleterious to health. The bill does not relate to any natural constituents of food products which are placed in the foods by nature itself. It is well known that in many kinds of foods in their natural state some quantity of poisonous or deleterious ingredients exist. How far these substances may be deleterious to health when the food articles containing them are consumed may be a subject of dispute between the scientists, but the bill reported does not in any way consider that question. If, however, poisonous or deleterious substances are added by man to the food product, then the bill declares the article to be adulterated and forbids interstate traffic.

The question whether certain substances are poisonous or deleterious to health the bill does not undertake to determine, but leaves that to the determination of the Secretary of Agriculture under the guidance of proper disinterested scientific authorities, after most careful study, examination, experiment, and thorough search.

While the provisions of the bill forbid the adulteration of food products, they also attempt to give a measure of protection to the consumer by forbidding interstate traffic in falsely labeled or branded articles. The theory of the bill is that the consumer of food products is entitled to consume whatever he may wish, but that he is also entitled, when he purchases an article purporting to be one thing, not to be cheated by having some inferior or different article passed off on him. The basis of the bill is to require at least a fair degree of honest dealing.

From a careful study of the data which have been considered by the committee through extensive hearings in this and former Congresses, it is certain that there is an immense amount of deception, fraud, and deliberate swindling practiced by the misbranding of food products. False and misleading claims are often found attached as a part of the label to food products. False statements of origin or of the country in which the substance is produced are often found. Where a particular State or locality has managed to build up a reputation for its products and thereby enhance their market value, it has become a somewhat common practice for manufacturers in other sections of the country to steal the name of the favored State or locality and thereby endeavor to steal the benefit of an enhanced price. This is unfair, both to the consumer and to the locality or State which is named. The pending measure forbids the entry into interstate commerce of such fraudulent labels and misleading descriptions.

Under the term "food" has been included not only ordinary foods, but also drinks, confectionery, and condiments. It has been shown by the researches of distinguished physiological chemists that beverages generally contain food products which, by their oxidation, furnish heat and energy, and also in many cases upbuild tissues and restore waste. Therefore, a food in liquor form may be considered from the same standpoint as any other food. Condiments are essential to modern food consumption and are, therefore, very properly included under the class of foods.

HONEST TRADE NEED NOT FEAR ITS PROVISIONS.

The penalties of the bill are aimed at cheats. That which is forbidden is the sale of goods under false pretenses, or the sale of poisonous articles as good food. No honest dealer need fear any provision in the bill. Legitimate trade should welcome its enactment into law. Only those wishing to deceive the public will object to its provisions. It simply requires honesty of labeling and the exclusion of injurious added products. He who wishes to sell 14 ounces as a pound, or to sell a cheap-trade article with a high-grade label at the price of the latter quality will denounce the bill as an invasion of the rights of trade, as an interference with the freedom of commerce, as an outrage upon the property rights of men. In the competition of modern business life it becomes necessary to give some protection to the legitimate manufacturer and dealer as against his dishonest and unscrupulous rival who unfairly competes with imitations and spurious articles of poor quality.

Adulteration of food of a harmful character has become prevalent to an alarming extent and, inspired by the cupidity of dishonest men, these adulterations are rapidly increasing, so that in many classes of foods it is difficult to obtain a pure article.

We believe everyone recognizes the necessity of governmental regulations to prevent the sale of adulterated, poisonous, or other injurious food products. The sand with which our forefathers are reputed to have adulterated their sugar, while a fraud upon the purchaser, was doubtless comparatively harmless. The adulterations of the present day are neither so clumsy nor, as a rule, so harmless. The ingenuity of man has been busy during the last half century in devising new forms of machinery, new methods of commercial enterprise, new ideas and new things in every branch and walk of life, including, new processes of cheapening the cost of the production of articles of food, drink, and drug by the use of mixtures, adulterants, and preservatives.

In so far as these are harmless and are not used as a fraud upon the purchaser or user they may be of great benefit, but the ingenuity of man in providing either the adulteration or the preservation of food products by the use of substances which are injurious and harmful to the human system must be met by governmental restraint. The varieties of adulterations are so numerous and so different in character that it is impossible to refer to them here even by general classes. Almost every known article of good food has to compete in the market with a similar article which has been adulterated in some form or its apparent freshness maintained by the use of a preservative.

The proposed bill is not the suggestion of a moment. It does not represent the opinion of a mere individual. It is the outgrowth of the agitation of many years and represents the suggestions, criticisms, propositions, and efforts of many minds. It is the epitome of the best thought on the subject in our land to-day. The main provisions of the substitute Hepburn bill, which we now recommend for passage, have been at different times favorably acted upon by both House and Senate. They have been approved by three successive national pure-food congresses and by many scientific bodies, sanitary congresses, and medical and business associations throughout the United States. We do not presume that the legislation we suggest will be found perfect. We do not doubt that in some respects it will be ineffective. In some particulars the bill may not go far enough and in others it may go too far. But whatever may be its merits or defects it represents the earnest thought and work of your committee.

It was not drawn to aid any special interests. It has not been framed by, or at the behest of, any class of trade which will be specially benefited thereby. It is not designed for the purpose of specially protecting one legitimate interest or of injuring another legitimate interest. The committee has steered clear of those special interests, some of which desire provisions in the bill which would aid them, and some of which desire provisions in the bill which would injure their business rivals. Nothing has been written into the bill either by greed or envy. The bill is what it purports to be, a measure in the interest of honest dealing and wholesome foods.

OFFICIALS TO CARRY OUT THE LAW.

The bill provides that the law shall be carried out under uniform rules and regulations to be made by the Secretaries of the three departments, to wit: Treasury, Agriculture, and Commerce and Labor. It is not designed to

add a vast number of employees to the Government service. If the bill becomes a law no additional employees can be added except as may be authorized by appropriations hereafter made by Congress. Nor will there be any considerable number of employees required in any event. The officials of the National Government having charge of the enforcement of the law will cooperate with the State food, dairy, and drug officials.

The prosecutions which will be commenced by the national authorities will be mainly directed against the manufacturers of food products; or, if it be impossible to find the manufacturer, against the jobbers and wholesale dealers. If the State officials cooperate, they will call the attention of the national authorities to the existence of adulterated and misbranded articles within the State borders. These articles will be examined under the direction of the Bureau of Chemistry; and if found contrary to the provisions of the act, then prosecutions will be commenced against the manufacturer, who will be known by his guaranty. There will be no occasion for many officials in the employ of the Government and no occasion for great expense.

It is not proposed by the bill to interfere in any way with the power of the State officials over local trade, but the purpose of the bill is to give to State officials the aid of the National Government and to receive from the State officials their aid in the enforcement of the national law.

The passage of this bill is in the interest of protecting the weak from the powerful, the poor consumer from the rich manufacturer.

The laboring man or artisan, who knows his own trade, but who may not be an expert in the quality of foods or their imitations or adulterations, is entitled to the protection of the State to the extent that when he purchases an article for the consumption of his family he receives what he pays for, and further, to know that the food which he buys and eats shall give him strength and vigor instead of containing some harmful substance or poison which, in the end, breaks down his health. What is true of such a man is true of all the rest of us. The public is entitled to protect itself against those who would cheat and defraud it in those necessities of life where one can not tell the spurious from the genuine, either by casual examination or by consumption.

We think it is the duty of the State to give to the public the measure of protection offered by the provisions of the bill which we have recommended for passage.

COMMITTEE AMENDMENT.

Amend the bill by striking out all after the enacting clause and inserting in place thereof as a substitute the following:

That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this act, is hereby prohibited; and any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, or who, having received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor, and for such offense be fined not exceeding two hundred dollars for the first offense, and upon conviction for each subsequent offense not exceeding three hundred dollars or be imprisoned not exceeding one year, or both, in the discretion of the court: *Provided, however*, That no person shall be liable to the penalty of imprisonment as provided herein unless he knowingly committed the offense charged: *Provided further*, That no article shall be deemed misbranded or adulterated within the provisions of this act when intended for export to any foreign country and prepared or packed according to the specifications or directions of the foreign purchaser when no substance is used in the preparation or packing thereof in conflict with the laws of the foreign country to which said article is intended to be shipped; but if said article shall be in fact sold or offered for sale for domestic use or consumption, then this proviso shall

not exempt said article from the operation of all the other provisions of this act.

SEC. 2. That the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this act, including the collection and examination of specimens of foods and drugs manufactured or offered for sale in the District of Columbia or in any Territory of the United States, or which shall be offered for sale in unbroken packages in any State other than that in which they shall have been respectively manufactured or produced, or which shall be received from any foreign country, or intended for shipment to any foreign country, or which may be submitted for examination by the chief health, food, or drug officer of any State, Territory, or the District of Columbia, or at any domestic or foreign port through which such product is offered for interstate commerce, or for export or import between the United States and any foreign port or country.

SEC. 3. That the examinations of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of such bureau, for the purpose of determining from such examinations whether such articles are adulterated or misbranded within the meaning of this act; and if it shall appear from any such examination that any of such specimens is adulterated or misbranded within the meaning of this act the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such sample was obtained. Any party so notified shall be given an opportunity to be heard, under such rules and regulations as may be prescribed as aforesaid, and if it appears that any of the provisions of this act have been violated by such party, then the Secretary of Agriculture shall at once certify the facts to the proper United States district attorney, with a copy of the results of the analysis or the examination of such article, duly authenticated by the analyst or officer making such examination, under the oath of such officer. After judgment of the court notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid.

SEC. 4. That it shall be the duty of each district attorney to whom the Secretary of Agriculture shall report any violation of this act, or to whom any health or food or drug officer or agent of any State, Territory, or the District of Columbia shall present satisfactory evidence of any such violation, to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the penalties as in such case herein provided.

SEC. 5. That the term "drug," as used in this act, shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals. The term "food," as used herein, shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound.

SEC. 6. That for the purposes of this act an article shall be deemed to be adulterated—

In case of drugs:

First. If, when a drug is sold under the standard recognized in the United States Pharmacopœia or National Formulary, it differs from the standard of strength, quality, or purity, as determined by the test laid down in the United States Pharmacopœia or National Formulary official at the time of the investigation.

Second. If its strength or *purity* differ from any other professed standard or *quality* under which it is sold.

In the case of confectionery:

If it contain terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health.

In the case of food:

First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

Second. If any substance has been substituted wholly or in part for the article.

Third. If any valuable constituent of the article has been wholly or in part abstracted.

Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health: *Provided*, That when in the preparation of food products for shipment they are preserved by an external application applied in such manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, the provisions of this act shall be construed as applying only when said products are ready for consumption.

Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter.

Sec. 7. That the term "misbranded," as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement regarding the ingredients or substances contained in such article, which statement shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

That for the purposes of this act an article shall also be deemed to be misbranded:

In case of drugs—

First. If it be an imitation of or offered for sale under the name of another article.

Second. If the contents of the original package shall have been removed, in whole or in part, and other contents shall have been placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of any alcohol therein, or of any opium, cocaine, or other poisonous substance which may be contained therein.

In the case of food—

First. If it be an imitation of or offered for sale under the distinctive name of another article.

Second. If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so.

Third. If in package form, the quantity of the contents of the package be not plainly and correctly stated in terms of weight or measure, on the outside of the package.

Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends: *Provided*, That the term blend as used herein shall be construed to mean a mixture of like substances not excluding harmless coloring or flavoring ingredients: *And provided further*, That nothing in this act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding.

Sec. 8. That no dealer shall be convicted under the provisions of this act when he is able to prove a guaranty of conformity with the provisions of this act in form approved by the rules and regulations herein provided for, signed by the manufacturer or the party or parties from whom he purchased said articles: *Provided*, That said guarantor resides within the United States. Said guaranty shall contain the full name and address of the guarantor making the sale to the dealer, and said guarantor shall be amenable to the prosecutions, fines, and other penalties which would otherwise attach in due course to the dealer under the provisions of this act.

SEC. 9. That it shall be the duty of the Secretary of Agriculture to fix standards of food products when advisable for the guidance of the officials charged with the administration of food laws and for the information of the courts, and to determine the wholesomeness or unwholesomeness of preservatives and other substances which are or may be added to foods; and to aid him in reaching just decisions in such matters he is authorized to call upon the committee on food standards of the Association of Official Agricultural Chemists, and the committee of standards of the Association of State Dairy and Food departments, and such other experts as he may deem necessary. And upon request made to the Secretary of Agriculture prior to reaching any decision as provided for in this section, by any manufacturer or other person interested, asking for the appointment of a board to determine the wholesomeness or unwholesomeness of any preservative or other substance which is or may be added to foods, and concerning the use of which the person making the request has an interest, it shall be the duty of the Secretary of Agriculture to appoint a board of disinterested experts, which board shall consist of five members, one of whom shall be an expert toxicologist, one an expert physiological chemist, one an expert bacteriologist, one an expert pathologist, and one an expert pharmacologist, which board shall meet at the city of Washington, D. C., or elsewhere, at the call of the Secretary of Agriculture, and pass upon such question after proper notice and hearing granted to the person making such request. The compensation of the members of such board shall be fixed by the Secretary of Agriculture.

SEC. 10. That every person who manufactures or produces for shipment and delivers for transportation within the District of Columbia or any Territory, or who manufactures or produces for shipment or delivers for transportation from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any drug or article of food, and every person who exposes for sale or delivers to a purchaser in the District of Columbia or any Territory any drug or article of food manufactured or produced within said District of Columbia or any Territory, or who exposes for sale or delivers for shipment any drug or article of food received from a State, Territory, or the District of Columbia other than the State, Territory, or the District of Columbia in which he exposes for sale or delivers such drug or article of food, or from any foreign country, shall furnish within business hours and upon tender and full payment of the selling price a sample of such drug or article of food to any person duly authorized by the rules and regulations herein provided for to receive the same, and who shall apply to such manufacturer, producer, or vendor, or person delivering to a purchaser, such drug or article of food, for such sample for such use, in sufficient quantity for the analysis of any such drug or article of food in his possession.

SEC. 11. That any manufacturer, producer, or dealer who refuses to comply, upon demand, with the requirements of section ten of this act shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding one hundred dollars, or imprisoned not exceeding one hundred days, or both. And any person found guilty of manufacturing or offering for sale, or selling, an adulterated or misbranded article of food or drug in violation of the provisions of this act may, in the discretion of the court, be adjudged to pay, in addition to the penalties hereinbefore provided for, all the necessary costs and expenses incurred in inspecting and analyzing such adulterated articles which said person may have been found guilty of manufacturing, selling, or offering for sale.

SEC. 12. That this act shall not be construed to interfere with commerce wholly internal in any State, nor with the exercise of their police powers by the several States; but foods and drugs fully complying with all the provisions of this act shall not be interfered with by the authorities of the several States when transported from one State to another so long as they remain in original unbroken packages, except as may be otherwise defined by law or provided by statutes of the United States.

SEC. 13. That any article of food or drug that is adulterated or misbranded within the meaning of this act, and is transported or being transported from one State to another for sale, or if it be sold or offered for sale in the District of Columbia or any Territory of the United States, or if it be imported from a foreign country for sale, or if intended for export to a foreign country, shall be liable to be proceeded against in any district court of the United States, within the district where the same is found, and seized by a process of libel for condemnation. And if such article is condemned as being adulterated or misbranded, within the meaning of this act, the same shall be disposed of as

the said court may direct, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States, but such goods shall not be sold in any State contrary to the laws of that State. The proceedings of such libel cases shall conform as near as may be to proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in such case; and all such proceedings shall be at the suit of and in the name of the United States.

SEC. 14. That the Secretary of Agriculture is authorized to investigate the character and extent of the adulteration of foods and drugs, and whenever he has reason to believe that articles are being imported from foreign countries which by reason of such adulteration are dangerous to the health of the people of the United States, or are of kinds which are forbidden entry into or forbidden to be sold or restricted in sale in the countries in which they are made or from which they are exported, or which shall be falsely labeled in any respect, either by the omission of the name of any added ingredient or otherwise, or in regard to the place of manufacture, or the contents of the package, shall make a request upon the Secretary of the Treasury for samples from original packages of such articles for inspection and analysis; and the Secretary of the Treasury is hereby authorized to open such original packages and deliver specimens to the Secretary of Agriculture for the purpose mentioned, giving due notice to the owner or consignee of such articles, who may appear before the Secretary of Agriculture and have the right to introduce testimony; and the Secretary of the Treasury shall refuse delivery to the consignee of any of such goods which the Secretary of Agriculture reports to him have been inspected and analyzed and found to be any of the kinds mentioned in this section: *Provided*, That the Secretary of the Treasury may deliver to the consignee such goods, pending examination and decision in the matter, on execution of a penal bond of the full invoice value of such goods, together with the duty thereon, and on refusal to return such goods for any cause to the custody of the Secretary of the Treasury, when demanded, for the purpose of excluding them from the country, or for other purposes, said consignee shall forfeit the full amount covered by the bond.

SEC. 15. That the term "territory" as used in this act shall include the insular possessions of the United States.

SEC. 16. That this act shall be in force and effect from and after its passage: *Provided, however*, That no penalties herein named shall be imposed until after the expiration of one year from the passage of the act.

LEGISLATIVE HISTORY OF THE SHERLEY AMENDMENT.

An Act To amend section 8 of the Food and Drugs Act, approved June 30, 1906.

	Page.
Message of President Taft, dated June 20, 1911, recommending amendment of the Food and Drugs Act so as to make it applicable to false and misleading statements borne on the packages and labels of drug products relative to their therapeutic or curative value (H. Doc. 75). Cong. Rec., 62d Cong., 1st sess.	2379-2380, 2434
Message of the President ordered printed and referred to the Committee on Interstate and Foreign Commerce of the House, and Senate Committee on Manufactures. Cong. Rec., 62d Cong., 1st sess., June 21, 1911.	2380, 2434
Bill (H. R. 11877) to amend section 8 of the Food and Drugs Act, approved June 30, 1906, introduced and referred to the Committee on Interstate and Foreign Commerce. Cong. Rec., 62d Cong., 1st sess., June 20, 1911.	2362
Reported back without amendment, accompanied by a report (No. 1138), and referred to the House Calendar. Cong. Rec., 62d Cong., 2d sess., Aug. 5, 1912.	10257
Debated, amended, and passed by the House August 19, 1912. Cong. Rec., 62d Cong., 2d sess. (see also Appendix, p. 675).	11322-11323
Debated and passed by the Senate August 20, 1912. Cong. Rec., 62d Cong., 2d sess.	11352
Approved (Public, No. 301) August 23, 1912. Cong. Rec., 62d Cong., 2d sess.	11744, 11853
Reports:	
Message of the President, H. Doc. 75, 62d Cong., 1st sess.	
House Report, No. 1138, 62d Cong., 2d sess.	

LEGISLATIVE HISTORY OF THE GOULD AMENDMENT.

An Act To amend section 8 of the Food and Drugs Act, approved June 30, 1906.

	Page.
Bill (H. R. 22526) introduced March 28, 1912, and referred to the Committee on Interstate and Foreign Commerce. Cong. Rec., 62d Cong., 2d sess.....	3981
Reported back with amendment June 7, 1912, accompanied by a report (No. 850), and referred to the House Calendar. Cong. Rec., 62d Cong., 2d sess.....	7833-7834
Debated, amended, and passed by the House August 5, 1912. Cong. Rec., 62d Cong., 2d sess.....	10235-10236
Bill (H. R. 22526) read twice by its title in Senate and referred to the Committee on Manufactures August 6, 1912. Cong. Rec., 62d Cong., 2d sess.....	10264-10265
Reported back February 17, 1913, with amendments, accompanied by a report (No. 1216). Cong. Rec., 62d Cong., 3d sess.....	2273-2274
Debated, amended, and passed by the Senate February 20, 1913. Cong. Rec., 62d Cong., 3d sess.....	3503
House disagrees to Senate amendments and asks for a conference February 21, 1913. Conferees appointed. Cong. Rec., 62d Cong., 3d sess.....	3618
Senate insists on its amendments and agrees to conference February 24, 1913. Conferees appointed. Cong. Rec., 62d Cong., 3d sess.....	3762
Conference report (No. 1579) made and agreed to in the House February 26, 1913. Cong. Rec., 62d Cong., 3d sess.....	4123
Vote on conference report reconsidered in the House and conference report withdrawn February 27, 1913. Cong. Rec., 62d Cong., 3d sess.....	4256
Conference report made, debated, and agreed to in Senate February 28, 1913. Cong. Rec., 62d Cong., 3d sess.....	4286, 4287, 4299-4301
Conference report (No. 1606) made and agreed to in the House March 1, 1913. Cong. Rec., 62d Cong., 3d sess.....	4559
Presented to the President for approval March 2, 1913. Cong. Rec., 62d Cong., 3d sess.....	4635
Approved March 3, 1913 (Public, No. 419).....	4854
Reports:	
House Report 850, 62d Cong., 2d sess.	
Senate Report 1216, 62d Cong., 2d sess.	
Conference Report 1579, 62d Cong., 2d sess.	
Conference Report 1606, 62d Cong., 3d sess.	

REPORT OF THE SOLICITOR GENERAL TO THE PRESIDENT UPON CERTAIN QUESTIONS SUBMITTED TO HIM CONCERNING THE MEANING OF THE TERM "WHISKY".¹

[1] DEPARTMENT OF JUSTICE,
May 24, 1909.

THE PRESIDENT.

SIR: Pursuant to the Executive Order made by the President of the United States on April 8, 1909, which reads:

A number of distillers and importers of spirits and whisky, represented by Lawrence Maxwell, Esq., Hon. Joseph H. Choate, Alfred Lucking, Warwick M. Hough, and Hon. W. W. Armstrong, having appealed to the President for a hearing with respect to the order issued by the Commissioner of Internal Revenue, known as Order No. 723, pursuant to the rules and regulations for the enforcement of the Food and Drugs Act and Food Inspection Decision No. 65, promulgated and made by the Secretary of Agriculture under date of May 14, 1908, claiming that the provisions of said order are in violation of the terms of the said act in that they require to be branded as imitations or compounds, or otherwise, whiskies which have well-settled names in the trade, and which it was not the intention of Congress by the said Food and Drugs Act to require to be described by any other designation; and certain distillers of whisky having appeared by Edmund W. Taylor and the Hon. John G. Carlisle,

¹ See F. I. D. 45, 65, 95, 98, 113, 118, and 127, pp. 36, 51, 110, 113, 129, 133, and 139, *ante*; also Opinions of the Attorneys General, pp. 775, 783, and 797, *ante*; and Decision of the President, p. 831, *post*, on the labeling of whiskies.

after consideration the matter is hereby referred to Hon. Lloyd W. Bowers, Solicitor General of the [2] United States, to take testimony and report to the President his opinion upon the following points, namely:

I. What was the article called whisky as known (1) to the manufacturers, (2) to the trade, and (3) to the consumers at and prior to the date of the passage of the pure food law?

II. What did the term *whisky* include?

III. Was there included in the term *whisky* any maximum or minimum of congeneric substances as necessary in order that distilled spirits should be properly designated *whisky*?

IV. Was there any abuse in the application of the term *whisky* to articles not properly falling within the definition of that term at and prior to the passage of the pure food law, which it was the intention of Congress to correct by the provisions of that act?

V. Is the term *whisky* as a drug applicable to a different product than *whisky* as a beverage? If so, in what particulars?

The Solicitor General will from time to time determine the extent and character of the [3] hearing and will report with his opinion the evidence taken by him pursuant hereto.

WM. H. TAFT.

APRIL 8, 1909.

I have the honor respectfully to report as follows:

At the beginning of the hearings on April 8, 1909, appearances were made before me by Hon. Joseph H. Choate and Alfred Lucking, Esq., on behalf of Hiram Walker & Sons, manufacturers; Lawrence Maxwell, Jr., Esq., and Warwick M. Hough, Esq., on behalf of rectifying distillers and blenders and eastern rye distillers; Hon. John G. Carlisle and Edmund W. Taylor, Esq., on behalf of various whisky distillers; and William W. Armstrong, Esq., on behalf of Duffy's Malt Whisky Company.

On May 15, 1909, appearance was made before me by J. D. Rouse, Esq., on behalf of the Louisiana Distillery Company.

On April 8, 1909, preliminary statements were made, but no evidence was taken. On April 17, 1909, the taking of evidence began, and it continued from day to day (except Sundays) through May 1, 1909.

On May 7 and 8, 1909, final arguments were made by the parties appearing as above stated on April 8, 1909.

On May 15, 1909, evidence was taken at the instance of the parties appearing on that day, and argument also was then made for those parties.

[4] TESTIMONY AND ARGUMENT.

The oral testimony taken before me comprises 2,365 pages, contained in 17 separate books, numbered 1 to 16 consecutively, and also 19; each labeled upon its cover "Use of the Term Whisky. Before the Solicitor General," over my signature.

A voluminous mass of documentary evidence also was submitted to me.

The final arguments of counsel, made on May 7, 1909, and May 8, 1909, are found in books numbered 17 and 18 and labeled and signed by me like the books of testimony. The arguments for the parties appearing before me on May 15, 1909, are contained in book 19, above mentioned, on pages 2721-2742.

All the testimony and documentary evidence offered before me and the arguments made before me accompany, and are submitted as part of, this report.

ANSWERS TO THE SEVERAL QUESTIONS STATED IN THE ORDER OF THE PRESIDENT.

The first question is:

I. What was the article called whisky as known (1) to the manufacturers, (2) to the trade, and (3) to the consumers at and prior to the date of the passage of the pure food law?

My opinion upon, and answer to, this question is:

(1) The article called whisky as known to the manufacturers at and prior to the date of the passage of the pure food law was—

[5] (a) What is often spoken of as "straight whisky," made from grain.

(b) Also, what is often spoken of as "rectified whisky," made from grain, when not a mere neutral spirit, as described in section (d), below, of the answers to this question I.

(c) Also, a mixture of straight whiskies, or of rectified whiskies, or of straight whisky and rectified whisky, or of straight whisky and what is often known as neutral spirit (made from grain), or of rectified whisky and such neutral spirit (made from grain), or of straight whisky, rectified whisky and such neutral spirit (made from grain), if in the particular case the mixture satisfied the description of whisky given below in answer to question II.

(d) Also, neutral spirit—being a distillate from grain, which lacks a substantial amount of by-products (other than alcohol) derived by distillation from grain and giving distinctive flavor and properties—when, but only when, colored and flavored and sold by the manufacturer to a retailer; but the purchasing retailer in such case seldom knew that in fact he was getting neutral spirit, colored and flavored.

Such neutral spirit made from grain was not known to the manufacturer as whisky in the dealings of distillers with rectifiers; and I do not consider that it is proved to have been known as whisky in the dealings of distillers or rectifiers with wholesalers. A neutral spirit made from molasses, potatoes, or any other substance than grain has not been known to manufacturers as whisky, except in very rare cases.

(2) The article called whisky as known to the trade at and prior to the date of the passage of the pure food law was—

(a) What is often spoken of as "straight whisky," made from grain.

(b) Also, what is often spoken of as "rectified whisky," if conforming to the description of whisky given below in answer to question II.

(c) Also, a mixture of straight whiskies, or of rectified whiskies, or of straight whisky and rectified whisky, or of straight whisky and what is often known as neutral spirit (made from grain), or of rectified whisky and such neutral spirit (made from grain), or of straight whisky, rectified whisky, and such neutral spirit (made from grain), if in the particular case the mixture satisfied the description of whisky given below in answer to question II.

(d) Also, neutral spirit—being a distillate from grain, which lacks a substantial amount of by-products (other than alcohol), derived by distillation from grain and giving distinctive flavor and properties—when colored and flavored; except that neutral spirit was not known to retail dealers as whisky, because such retailers seldom were aware that the article which they were buying or selling was in fact neutral spirit.

A neutral spirit made from molasses, potatoes, or other substance than grain has not been known to the trade as whisky.

[7] (3) The article called whisky as known to the consumers at and prior to the date of the passage of the pure food law was—

(a) What is often spoken of as "straight whisky," made from grain.

(b) Also, what is often spoken of as "rectified whisky" is conforming to the description of whisky given below in answer to question II.

(c) Also, a mixture of straight whiskies, or of rectified whiskies, or of straight whisky and rectified whisky, or of straight whisky and what is often known as neutral spirit (made from grain), or of rectified whisky and such neutral spirit (made from grain), or of straight whisky, rectified whisky, and such neutral spirit (made from grain), if in the particular case the mixture satisfied the description of whisky given below in answer to question II.

A neutral spirit derived by distillation from anything else than grain has not been known to the consumer as whisky, whether or not it was colored or flavored or both colored and flavored; and a neutral spirit derived by distillation from grain, but lacking a substantial amount of by-products (other than alcohol) which are derived by distillation from grain and give distinctive flavor and properties, has not been known to the consumer as whisky, whether or not it was colored or flavored or both colored and flavored.

[8] The second question is:

II. What did the term whisky include?

My opinion upon and answer to this question is:

The term "whisky" included, both at and prior to the date of the passage of the pure food law, and has since included, the spiritous liquor composed of (1) alcohol derived by distillation from grain; (2) a substantial amount of by-products (often spoken of as congeners) likewise derived by distillation from grain and giving distinctive flavor and properties; (3) water sufficient without unreasonable dilution, to make the article potable; and (4) in some cases—though such addition is not essential—harmless coloring or flavoring

matter, or both, in amount not materially affecting other qualities of whisky than its color or flavor.

A mixture of two or more articles, being each a whisky within the foregoing description, was at and prior to the date of passage of the pure food law, and has since been, whisky. A mixture of one or more whiskies, being each whisky within the foregoing description, with alcohol or a neutral spirit—being an article different from whisky through lack of a substantial amount of by-products derived by distillation from grain, and giving distinctive flavor and properties—is whisky, if the alcohol or neutral spirit is derived by distillation from grain, and if the mixture still conforms to the above general description of whisky; and so it was at and prior to the date of passage of the pure food law.

[9] A spirit derived from any other substance than grain was not at or prior to the date of passage of the pure food law, and has not since been, whisky; and a mixture of a whisky with such spirit was not at or prior to the passage of the pure food law, and has not since been, whisky.

A neutral spirit derived by distillation from grain, but lacking a substantial amount of by-products derived by distillation from grain and giving distinctive flavor and properties, was not at or prior to the passage of the pure food law, and has not since been, whisky.

The third question is:

III. Was there included in the term whisky any maximum or minimum of congeneric substances as necessary in order that distilled spirits should be properly designated whisky?

My opinion upon and answer to this question is:

There was included in the term whisky a minimum of congeneric substances as necessary in order that the distilled spirit should be properly designated as whisky, viz., such substantial amount of those congeneric substances as is requisite to give to whisky distinctive flavor and properties, differing from the flavor and properties of alcohol and of other distilled spirits. There was no maximum of such congeneric substances, however, except as potability might demand.

[10] The fourth question is:

IV. Was there any abuse in the application of the term whisky to articles not properly falling within the definition of that term at and prior to the passage of the pure food law, which it was the intention of Congress to correct by the provisions of that act?

My opinion upon, and answer to, this question is:

There were such abuses. The evidence, however, has not been such as to make possible, or to justify an attempt at, enumeration of the particular abuses, beyond saying that they included the application of the term "whisky" to spirits distilled from other substances than grain, or to mixtures of such spirits with whisky, or to neutral spirits derived from grain but not whisky within the description of it given in answer to question II, or to such mixtures of neutral spirits and whisky as do not fall within the description of whisky given in answer to question II.

The fifth question is:

V. Is the term whisky as a drug applicable to a different product than whisky as a beverage? If so, in what particulars?

My opinion upon, and answer to, this question is:

The term whisky as a drug is not applicable to a different product than whisky as a beverage.

[11] AN OUTLINE STATEMENT OF SOME PRINCIPAL GROUNDS OF THE FOREGOING ANSWERS.

It seems proper, and even due, that I give briefly my chief reasons for some of the answers above made; especially where those answers depend in part upon legal considerations. The evidence discloses little conflict among the witnesses or in the literature concerning pure facts; and a detailed review of it therefore becomes undesirable, unless further report of that character be hereafter directed.

The questions which I have been called upon to consider have no answer in the act of Congress approved June 30, 1906, and known as the pure food law. That statute deals with whisky as well as food, drink, confectionery, condiments and drugs generally, and prohibits their adulteration or misbranding; but it does not afford any means of determining what any one of such articles is in its

true nature or proper constituents. Before it can be said whether an article is adulterated, by being made to be other than its true nature requires, or is misbranded by being given a name which is not properly applicable to the article, it is necessary first to know what the article really is—in its true nature and ingredients—whose name is given to the thing claimed to be adulterated or misbranded. Concretely, before one can say whether the name "whisky" is wrongly applied to a particular article, it is necessary first to ascertain what is properly called whisky; and that must be ascertained outside the statute.

[12] Nor do the questions which I have been called upon to answer relate at all to the relative excellence or merit of one or another article. The problem is not whether straight whisky is better than a blend, or the reverse; or whether whisky is better than alcohol, or the reverse; or whether whisky, gin, brandy, or rum is best; or whether whisky or water is better. The sole problem is, what is whisky in the general and true significance of that name; or what makes a thing whisky, instead of its being alcohol, brandy, gin, rum, or water?

Whisky is not a natural product. It is always a thing manufactured by man. Whether a thing be natural or artificial, however, its name is given to it by man; and accordingly in this matter of names the actual usage of the people controls. A name imports what the people understand by it. The questions in hand can be determined therefore only by endeavoring to ascertain the significance of the word "whisky" in the public mind; and that depends upon intelligent public usage.

Further, it is the usage of the public at large and of the public of the United States, rather than the verbal practice of manufacturers or traders in whisky (if that practice differs from general usage) or the public usage in foreign countries, which must decide what the name "whisky" means.

The pure food act and all similar statutes are intended for the protection of the general public, the fundamental object of such enactments being to assure to the people generally their receipt and use [13] of the very article which, by reason of the public meaning of the name under which they ask for or accept a thing, they expect and are entitled to have. In other words, the pure food act is designed to prevent the fraudulent imposition upon the ordinary purchaser or consumer of an article different in character or quality from what such ordinary purchaser or consumer may fairly expect in consequence of the ordinary and general meaning of the name under which he orders or receives that article. Insistence upon the controlling force of the popular meaning of whisky is necessary in this matter because, as I have found, the usage of manufacturers and dealers, in reference to the name whisky, differs importantly from the usage of people at large; though, as I have also found, the name whisky is used generally by retailers in the trade quite as the public use it.

It is thoroughly established that, in such a matter as the present, the popular use and meaning of such a name as whisky must control the trade use or meaning of that name, if the two differ. Two leading judicial decisions will illustrate this. In England, upon a prosecution for selling adulterated green tea, it was found that the article alleged to be adulterated was imported from China and was not a natural green tea, but was colored in China; that this article, however, was the tea generally known to the trade as green tea; that a natural green tea is grown in Japan, but was not generally known to the trade as green tea; and it was held that consumers were entitled [14] to expect the natural article under the name "green tea," notwithstanding the contrary use of that name by the trade. The court said:

"It may be that green tea may come in time to mean pure tea with a facing of foreign materials. According to the case, that is now the opinion of the tea trade. * * * *The question, however, is what the public who are the purchasers and consumers understand by the expression "green tea" when they ask to buy it.* The case finds that the public know nothing about the coloring of gypsum and Prussian blue. Except for its being an article of commerce known in the trade as green tea, this mixture would be admittedly an adulteration; and the fact of the public ignorance makes it so in this case, notwithstanding the received use of the term amongst persons who know what it means. (Roberts v. Edgerton, 30 L. T. (N. S.), 633.)"

In this country a similar ruling has been made. In a controversy over the rightful use of the name "Syrup of Figs" it appeared that the main ingredient of syrup of figs was not fig syrup at all, but syrup of senna; that the true constitution of the article, however, had come generally to the knowledge of the trade through various trade publications; but that the public had been

led to believe, and did believe, that the article was made mainly of fig syrup. The United States Supreme Court refused to protect the name "Syrup of Figs," on the ground that it deceived the public though the trade understood it, saying:

[15] "Such publications [i. e., as to the true character of the article] went only to giving information to wholesale dealers. The company by the use of the terms of its so-called trade-mark on its bottles, wrappers and cartons, continued to appeal to the consumers, out of whose credulity came the profits of their business. And, indeed, it was the imitation by the defendants of such false and misleading representations that led to the present suit. (Worden v. California Fig Syrup Co., 187 U. S. 516.)"

I turn now to the question which is perhaps of chief moment in the controversy over whisky, viz., whether a so-called "neutral spirit," i. e., a distillate from grain which is not substantially different from pure ethyl alcohol (likewise made from grain), may properly be called whisky; which question, in view of the decisive influence of general, popular usage, is really whether neutral spirit has come to be called whisky by the people at large. I have found that such neutral spirit, at least when colored and flavored like some whisky, has been actually called whisky for a long period by manufacturers in their sales to retailers and by wholesale and retail traders in their dealings with one another and with consumers; but I have likewise found that this same neutral spirit was being sold during the same period by distillers to rectifiers as neutral spirit—and not as whisky—and that retail traders seldom knew that they were receiving or were selling a mere neutral spirit, and that consumers have not known that in fact they were using a mere neutral [16] spirit, given them under the name of whisky. Under these conditions I have been unable to accept the view that such neutral spirit has become entitled to the name "whisky;" and several reasons seem to forbid any such view.

1. There is no possible doubt that the public has been almost always ignorant that it was actually receiving and using a practically pure alcohol.

During the long period of the manufacture of whisky before 1870 or somewhat later (when the modern processes for making neutral spirit came into growing use), whisky unmistakably contained beside alcohol an important amount of associated products derived with the alcohol by distillation from a ferment of grain; and the word "whisky," therefore, certainly indicated until 1870 or somewhat later an article containing such grain contributions other than alcohol. It seems to me that the name "whisky" can not be considered to have been extended by the public since 1870 to an article importantly different from what before 1870 was known as whisky, viz., to pure or practically pure alcohol, without its being shown that the public since 1870 have accepted the name "whisky" in such radically new and different application *with knowledge* that what was being given them as whisky was in fact alcohol. In the absence of such knowledge, the public must have supposed that they were still getting under the name of whisky what they had always previously gotten under that name. In other words, while the people make their language and give its words their meaning, that process de[17]pends upon the conscious and intelligent application of words to given ideas or things. A name does not come to include a new article, different from what has previously been known under that name, through mere application of the name to such new article by mistake or in ignorance, whether or not the mistake be induced or the ignorance be caused by fraud. Names embrace only such things as the people actually have in mind when they use those names.

However different alcohol be from whisky which contains a substantial amount of by-products derived with its alcohol from grain, it may be admitted that alcohol could come to be embraced within the name whisky if the public were consciously designating alcohol as whisky; but it is quite immaterial how extensively alcohol has been given to the public or received by it as whisky if the public did not know that it was in fact getting mere alcohol. The public can not be held to intend or consent that alcohol be called whisky without knowing that the article to which the name is being applied is really alcohol.

2. Further, as I have found, the retail dealers themselves have been largely ignorant that neutral spirit was actually being sold them when they ordered whisky, or that they were selling neutral spirits to consumers asking for whisky. An important part of the trade consequently has not yet consciously accepted the name "whisky" for pure or practically pure alcohol. Also, as I have found, rectifiers do not order neutral spirits from distillers under the name [18] "whisky," but they order it by the special and unmistakable name of neutral

spirit, cologne spirit, or perhaps, sometimes, merely spirit. Even trade usage has not been uniform.

3. The name "alcohol" admittedly persists in entirely general use, and the article to which it is applied is most familiar. Have the public come to call the same thing both whisky and alcohol indifferently? Or do they still mean different things by the two words? It can not readily be believed that these two words, alcohol and whisky, have become identified in general use.

4. The particular thing concerning which the public of the United States seems to be most united in reference to whisky is that it be made from grain. The literature of the subject insists upon this same point; though some dictionaries and other works recognize that it may be made from other substances, such as potatoes, beets, or molasses. It is unimportant for the present point whether molasses may be used in making whisky, and that question will be considered later. Even if whisky may be made from other things than grain, it unquestionably must retain the qualities fundamental in grain whisky. What, then, do the public and the literature of the subject mean when they dwell upon the importance of the grain origin of whisky? Do they mean that whisky shall derive no more than its alcohol from grain? Such a view would make it quite unimportant whether whisky is made from grain or from any other of the scores of articles from which alcohol can be derived; [19] for alcohol is the same thing whether derived from one or another source. If alcohol is whisky, then anything that will yield alcohol may properly be used for the production of whisky. In my opinion the importance attached to the origin of whisky in grain indicates that the grain must contribute to whisky some distinctive and peculiar elements which can not as well be gotten from other things than grain. Those other elements are the congeneric substances or by-products which are gotten with the alcohol through distillation from grain.

Just as whisky is commonly viewed as made from grain, rum is understood to be made from sugar cane or molasses, and brandy is understood to be made from fruits. The only things that differentiate whisky and rum and brandy are the by-products of the distillation; and if only alcohol is essential to whisky or to rum or to brandy, it might as well be said that whisky may be made from fruits or from molasses, because they will yield the same alcohol that is gotten from grain; and it might as well be said that rum may be made from grain or from fruits, because grain or fruits will yield the same alcohol that is gotten from sugar cane; and it might as well be said that brandy may be made from grain or from sugar cane, because grain or sugar cane will yield the same alcohol that is gotten from fruits. All distinctions between these articles fall unless they are differentiated by their by-products or congeners; and both the public views and the statements of the books about the origin of these several articles become trivial unless [20] distinctive and characteristic substances other than alcohol are essential to whisky, rum and brandy, respectively, and those substances are gotten from the grain or sugar cane or fruits from which the public and the books believe that the whisky, rum or brandy should be made.

An illustration may be taken from cane sugar, beet sugar and maple sugar. These three things have for their base an article called sucrose, which is identical whether it is gotten from one or another of the three things. By processes of refinement the associated or congeneric substances may be separated and the sucrose so gotten in pure form from either cane, beet or maple sugar. Is that sucrose, the common element in the three sugars, the same as any one of the three; and if the same as any one, is it not the same as all; and accordingly are not all three—cane, beet and maple sugar—themselves the same things? If sucrose is maple sugar or beet sugar or cane sugar, it would be foolish to say that maple sugar comes from the maple tree, or that cane sugar comes from sugar cane, or that beet sugar comes from beets; because the sucrose might as well come from any of them. In the same way it would be trivial, I think, for the public or the books to insist upon the grain origin of whisky if it may consist only of alcohol, which as well can be gotten from a hundred other things than grain.

5. Another thing which the witnesses agree is dominant in the public mind about whisky is its capacity for betterment through age. In this feature whisky is looked upon by the public just as wines, brandies [21] and rums are; all are thought to improve with age. The public therefore must still retain the idea that whisky consists of something else than alcohol, just as they must think that wines, rums and brandies consist of something else than alcohol;

for alcohol has not the property of improving by age as whiskies, wines, rums and brandies do. Next to the grain origin of whisky, this idea that whisky has a nature or is composed of things leading to improvement with age is probably the most common and definite of the public opinions about whisky; and it is significant of what the public must think whisky to be.

6. The United States Pharmacopœia (as revised to June 1, 1907) thus describes whisky: "An alcoholic liquid obtained by the distillation of the fermented mash of grain—such as Indian corn, rye, wheat and barley, or their mixtures. An amber-colored liquid having a distinctive odor and taste and a slightly acid reaction." Certain specific tests for good whisky, as distinguished from poor whisky, are then added; but they are unimportant here.

This definition of whisky is in line with the other tests which I have mentioned, and is weighty. Only grain is recognized as a proper origin for whisky; and beyond that whisky is recognized as having "a distinctive odor and taste." The odor and taste of alcohol are indisputably not those of whisky, any more than are the odor and taste of wine, rum, or brandy; and such distinctive odor and taste of whisky can only come from the by-products of its distillation, derived with the alcohol from the grain.

[22] 7. Several judgments of the courts are important. It has been distinctly held in United States Circuit Courts for the Southern District of Ohio (western division); for the Southern District of Illinois (northern division); for the Northern District of California; and for the Eastern District of Kentucky, that neutral spirit (that is, an article which is pure or practically pure alcohol) is not whisky. These decisions, indeed, go to the length of holding that the mixture of an admitted whisky with neutral spirit may cease to be whisky, if the addition of neutral spirit is unduly large; but they involve *a fortiori* that neutral spirit alone is not whisky.

Union Distilling Co. et al. *v.* Bettman et al.

Woolner & Co. et al. *v.* Rennick, Collector, et al.

Western Distilleries *v.* Muentner et al.

Joseph W. Cheeseman et al. *v.* Meyers.

(N. B.—These cases having not yet appeared in the regular legal reports, the first three may be found on pp. 120, 133, 137, Vol. 11, Internal Revenue Decisions, 1908. The Cheeseman case seems not yet to have been reported in any printed publication.)

The same thing, that alcohol is not whisky, was held by Attorney-General Taft under date August 4, 1875 (Int. Rev. Rec. and Customs Journal, issue of August 21, 1876; found in Vol. 22, No. 34, fol. No. 607).

In English, upon two prosecutions in the Borough of Islington for selling what was called in one case [23] Scotch and in the other case Irish whisky, though in fact it consisted in the former instance of a mixture of Scotch whisky and neutral spirit and in the latter instance of a mixture of Irish whisky and neutral spirit, the magistrate held the mixture to be unduly diluted with neutral spirit, and therefore not to be Scotch whisky or Irish whisky, and in the course of his decision also pronounced neutral spirit itself not to be whisky. I have been unable to find this decision reported elsewhere than in the publication of the United States Department of Agriculture, Bureau of Chemistry, Bulletin No. 102, issued December 20, 1906. The magistrate's decision was affirmed upon appeal by a tied court.

The case just mentioned led to a considerable agitation in Great Britain concerning the character and purity of the articles currently sold as whisky, and on February 17, 1908, a royal commission was appointed "to inquire and report"—

1. Whether, in the general interest of the consumer, or in the interest of the public health, or otherwise, it is desirable—

(a) To place restrictions upon the materials or the processes which may be used in the manufacture or preparation in the United Kingdom of Scotch whiskey, Irish whiskey, or any spirit to which the term whiskey may be applied as a trade description;

(b) To require declarations to be made as to the materials, processes of manufacture or preparation, or age of any such spirit;

[24] (c) To require a minimum period during which any such spirit should be matured in bond; and

(d) To extend any requirements of the kind mentioned in the two subdivisions immediately preceding to any such spirit imported into the United Kingdom.

2. By what means, if it be found desirable that any such restrictions, declarations or period should be prescribed, a uniform practice in this respect may be satisfactorily secured.

The final report of this commission has not yet been made, but on June 24, 1908, the commission submitted an interim report as follows:

"Whilst the labours of the commissioners are by no means terminated, we have arrived at certain conclusions, which we now humbly submit to Your Majesty as follows:

1. That no restrictions should be placed upon the processes of, or apparatus used in, the distillation of any spirit to which the term "whiskey" may be applied as a trade description.

2. That the term "whiskey" having been recognized in the past as applicable to a potable spirit manufactured from (1) malt, or (2) malt and unmalted barley or other cereals, the application of the term "whiskey" should not be denied to the product manufactured from such materials.

We reserve for further consideration the question of the advisability or otherwise of attaching special significance to particular [25] designations such as "Scotch Whiskey," "Irish Whiskey," "Grain Whiskey," and "Malt Whiskey"; of placing restrictions upon the use of such designations as trade descriptions; or of requiring such designations to be used in connection with the sale of whiskey.

We ask Your Majesty's permission to postpone stating in full the grounds upon which we have arrived at the above conclusions until we submit our final Report upon the matters referred to us."

It has been strongly contended that this report shows that neutral spirit properly passes as whisky in Great Britain, notwithstanding the case from the Borough of Islington. I do not so construe the report. In the first place, the questions submitted to the commission were what action, if any, of a legislative kind ought to be taken, instead of being questions concerning existing fact or law. The conclusion of the commission concerning the expediency of legislative action naturally would be, and probably was, quite unaffected by any question whether neutral spirit is really whisky in England as the law now stands. If neutral spirit is not whisky in England, as was announced in the Borough of Islington case, there would be no occasion for legislation to forbid its being called whisky, even if it were thought that it ought not to be called whisky; and, on the other hand, if neutral spirit is whisky in England, no legislative restrictions upon its being so called would be recommended unless the public health or other weighty considerations were found [26] to put the balance of advantage upon the side of a new restrictive rule.

In the second place, the commission expressly reserves the question whether some such name as "grain whisky" or other particular description ought not to be required for a neutral spirit, and any conclusion of the commission that neutral spirit should be permitted to be called whisky might be induced or at least importantly influenced by a preference for legislation requiring neutral spirit to be labeled "grain whisky" or by other distinctive name, clearly indicating its special and peculiar character, instead of requiring that neutral spirit be not called whisky at all.

The inquiry before me, however, as to what is whisky under existing fact and law in the United States, does not permit my taking into account the relative advantage of different legislative possibilities for practical treatment of the situation.

A report made by a Select Committee of the House of Commons of the British Parliament, appointed under order of July 7, 1890, for consideration of the subject of British and Foreign Spirits, is more pertinent to the questions before me than the stated Royal Commission's report. This Parliamentary committee's report (made April 30, 1891) takes the definite position that "whisky is certainly a spirit consisting of alcohol and water, with a small quantity of by-products coming from malt or grain, which give to it a peculiar taste and aroma" (p. V of the Report); and this position is in entire accord with, [27] and directly supports, the conclusion which I have reached concerning neutral spirit.

If, then, the by-products or congeneric substances derived by distillation from a fermented grain are necessary in some amount, beside alcohol, to make whisky, how much of these by-products is essential? All pertinent considerations show, in my opinion, that the amount of by-products must be substantial, giving to the whisky distinctive flavor and properties, but that no higher amount can be required and no more definite rule can be fixed.

1. It is obvious that no less than a substantial amount of by-products will suffice, otherwise there will be no substantial difference between alcohol and whisky. A mere trivial addition of by-products to alcohol can not convert it into whisky.

2. The problem really lies in the question whether all or most or any definite percentages of the by-products obtainable by distillation from grain are essential to whisky; and here the history of the art is quite decisive. As already said, whiskey is purely a manufactured article; and the evidence shows that it has never been made to contain all the by-products procurable by distillation from grain. Some of them have always been left behind in the distilling process or have been deliberately eliminated in the course of manufacture. Beyond that the course of the art has been continuously, though gradually, to reduce the amount of by-products in whisky. At any one time, too, the proportion of by-products has greatly varied in different places and among different makers. All [28] the while the public have accepted these articles, with varying strength or quantity of by-products, as whisky; and until the point was reached where a substantial amount of the by-products no longer remained in association with the alcohol it could not be said that the article had changed in kind. Until that point was reached the difference was only in degree. It is impossible to draw a line anywhere between what remains whisky and what ceases to be whisky, on the basis of the amount or proportion or strength of by-products or congeneric substances, until the alcohol no longer has with it a substantial amount of such by-products, giving distinctive flavor and properties and differentiating the article substantially from alcohol.

3. No one of the reasons I have given for my conclusion that pure or practically pure alcohol is not whisky prevents acceptance as whisky of an article in which the by-products of the distillation from grain are present in substantial and effective amount. The public are not given an article actually of a different kind in ignorance of that fact so long as the qualities of stronger whisky are present in substantial amount. The insistence of the public and of the general and technical literature on the subject that whisky be derived from a special source, rather than from any one of the many things out of which alcohol may be obtained, is satisfied. The names whisky and alcohol remain distinct instead of being identified. And the judicial decisions which I have cited are not contravened; for none of those cases decides what amount or strength of by-products must be present to [29] make whisky. Finally, the betterment from aging of course becomes possible when the by-products are present in substantial degree, whether or not that betterment is as great as would occur in a whisky containing more by-products.

4. Nor can it be an objection to the rule requiring a substantial amount of by-products to be present that the determination of such amount is a question of fact. In the absence of the erection of a definite standard by competent public authority, the distinction of whisky from alcohol inevitably will depend upon such question of somewhat indefinite fact. The law does not shrink from such questions; as is illustrated by the decisions of courts and juries concerning what is negligence (or a want of ordinary care), or concerning what is reasonable time, or concerning what is the reasonable or fair value of services or of goods upon which no definite price has been put by agreement. Indeed, in this very field of legislation concerning the adulteration or misbranding of food products the statute often itself recognizes a necessarily indefinite question of fact as decisive, and sometimes the statute even creates the question of fact. Thus, the English Sale of Food and Drugs Act, 1875 (38 and 39 Vict., c. 63), section 6, says that—

“No person shall sell to the prejudice of the purchaser any article of food, or any drug which is not of the nature, substance and quality of the article demanded by such purchase.”

[30] and it is held to be a question of fact under this act whether the article furnished the purchaser is what he “would reasonably expect to receive.” (*Webb v. Knight*, L. R. 2 Q. B. D., 530.)

Similarly, section 4 of the act of Congress approved May 9, 1902 (32 Stat., 193, 194), includes among different kinds of “adulterated butter” such as is made “with intent or effect of causing the absorption of abnormal quantities of water, milk, or cream;” and it is held that in the absence of definite regulations, such as the act empowers the Commissioner of Internal Revenue to make on the subject, a jury could determine whether the quantity of absorbed water,

milk, or cream is "abnormal." (*Coopersville Cooperative Creamery Co. v. Lemon*, 163 Fed. 145.)

The contention that whisky may be made from molasses I have found to be incorrect. This question, like most of the others, depends wholly upon the fact whether or not the American public have knowingly recognized and accepted as whisky an article made from such a source; and I am compelled to believe that most Americans would be surprised by an assertion that it could be so made. It is true that some dictionaries say that whisky, beside being made from grain, is sometimes made from potatoes or molasses; but such manufacture of whisky from potatoes has never existed, I believe, in Great Britain or in the United States, and its manufacture from molasses is not known to have occurred elsewhere than in the United States, and has been carried on only by two firms in the United States, and for a period not [31] very considerable. The public certainly can not be considered yet to have learned that what is sometimes given it as whisky—though on no relatively extensive scale—is actually made from molasses; nor can the public be considered yet consciously to have acquiesced in such an origin for whisky. It may be that by careful modern processes and management an article not very different from grain whisky can be made from molasses; but, on the other hand, differences will appear in consequence of the use of grain or molasses unless there be the nicest manipulation, and it is probable that some differences always exist. On the theory of the advocates of molasses whisky themselves, it would be just as possible to make rum or brandy from grain, or to make whisky or rum from fruits, as to make whisky from molasses. It would hardly be disputed, however, that the public have not come to the point of regarding rum or brandy as a thing made from grain, or of regarding whisky or rum as a thing made from fruit; and I consider and have found that the public likewise do not yet regard a thing made from molasses as whisky.

I come now to the subject of the addition of coloring or flavoring matter as affecting the right to the name whisky. On the one hand, the evidence convinces me that the public do not consider that added coloring or flavoring matter can make whisky out of what otherwise, or before such addition, is not whisky. Whisky is regarded generally and naturally as having a flavor and properties of its own. There is no more reason for saying that alcohol becomes whisky because [32] colored and flavored like some true whisky than for saying that alcohol becomes brandy or rum because colored and flavored like some brandy or rum. As a matter of fact, the manufacture of imitation brandies by this process of coloring and flavoring alcohol has at times been quite extensive in the United States and other countries. Nobody has yet contended, however, that such colored and flavored alcohol is brandy; though it has been sold to and used by the public under the name of brandy in quite the same way, and relatively perhaps to total consumption in as large amount, as colored and flavored alcohol has been given to the public as whisky.

On the other hand, the mere addition of harmless coloring or flavoring matter to what is previously whisky does not destroy its whisky character, unless such addition unduly dilutes or otherwise affects (as the addition of water may do) other essential properties of the whisky. It has always been true that coloring or flavoring matters of one or another kind were extensively used in making whisky. Old sherry casks long ago were used for this purpose in England. Saffron and fruit juices have long been so employed. And the evidence makes it quite clear that the use of the charred barrel for holding whisky is largely, and probably altogether, a method of coloring and flavoring; because the whisky derives from the charred barrel important quantities of tannin and certain tars and resins which affect the coloring and flavoring.

Whisky having been, then, in all its history extensively and variously colored and flavored, by addition [33] of extraneous matter, such coloring and flavoring can not be considered illegitimate or incompatible with the name whisky. The United States pure-food law also provides in terms that the addition of "harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only" is consistent with the term "blend," and therefore, of course, may be done without creating a compound article.

One of the most important matters in a practical view is whether a mixture of an admitted whisky with neutral spirit or alcohol may be called whisky. Such mixtures have been made most extensively for a very long period, and have become a most popular form of the beverage both in the United States and in England. It is even true, as I understand the testimony, that a larger quantity of these mixtures than of straight whisky has been consumed during

the last twenty years or more. My reasons for holding that this mixture of whisky with alcohol or neutral spirit is entitled to the name whisky—provided the mixture retains a substantial amount of by-products in proportion to the volume of the mixture, giving distinctive flavor and properties—are two:

1. As a matter of pure theory I can see no reason why the mixed article is not whisky, so long as it retains the substantial quality of whisky within the description which I have attempted in answer to question II. Alcohol is an admittedly proper and essential ingredient of whisky; indeed, it is whisky's chief ingredient. The addition of alcohol to whisky [34] is therefore not the introduction of a foreign substance, but is merely an enlargement of the proportion of one proper constituent. In other words, addition of alcohol to whisky is merely a form of dilution, just as the addition of water is. Nobody would contend that whisky is compounded or adulterated because more water is put with it unless the dilution by water goes so far as to rob the article of that substantial strength which is deemed characteristic of it. Dilution by water lessens both the alcoholic strength and the strength of the by-products, or what shortly may be called the congeneric strength of whisky. Dilution by alcohol lessens only the congeneric strength, without reducing the alcoholic strength. Why, then, may not alcohol be added just as well as water, without destroying the right of the article to be called whisky, unless the dilution with alcohol unduly affects the congeneric strength?

The grounds have already been given on which I have found that the by-products of distillation from grain need be present in whisky only to the extent of a substantial amount, which has and gives distinctive flavor and properties. All those reasons equally support the use of the name "whisky" for an article retaining such substantial amount of by-products, whether its content of by-products be the same as when the article first comes from the still or has been reduced within proper limits by subsequent addition of alcohol. For a particular case, we may notice the fact that straight whiskies themselves vary greatly in their congeneric strength; one straight [35] whisky sometimes being three or four times as strong as another in amount of congeners. Unmistakably, reduction of the stronger straight whisky by addition of alcohol to an identity with the weaker straight whisky does not deprive the mixed article of the name "whisky." In principle this case is the same as any other case of mixing with alcohol, if the dilution of congeneric strength does not go beyond the limit of preserving to the mixed article the requisite substantial amount of by-products.

2. It is really unimportant whether I am right on this point of mixing whisky and alcohol as a matter of theory or logic; for the most extensive acceptance and use of the mixed article by the public as whisky for a period probably not less than thirty years, and perhaps longer, has entitled it to the name "whisky" as a matter of fact. So long as the mixed article varies only in respect of being stronger or weaker, without losing distinctive flavor and properties in substantial degree, and consequently the article has not altered its essential nature, it can not be said that the public has given the name "whisky" to the article in ignorance of its character or under a delusion concerning the thing to which the name "whisky" was being applied. Even a compound article, made by the commingling of two things wholly foreign to each other, may, through informed application to it by the public of a single distinctive name acquire the full right to that name. In such case, the established distinctive name properly describes the compound article, and the pure-food act recognizes this, it being provided [36] in section 8 of that act "in the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article," the use of such name shall not be a misbranding. Whisky mixed with alcohol can not be an imitation of other whisky, while it still retains the requisite amount of by-products of the distillation from grain, because it is identical with unmixed whisky under the description which I have given of it; and mixed whisky which remains identical in constitution and character with another article properly called "whisky" can not in its own use of the name "whisky" be said to be using the distinctive name of the other, identical article. These things, as I have said, are true even when a single distinctive name is used for a true compound; even more plainly they must be true concerning the use of an established distinctive name for an article which is mixed only in the sense that a further quantity of one of its own proper and essential ingredients has been put into it.

In this connection I wish to quote from the report of the Select Committee on British and Foreign Spirits, appointed under order of the House of Commons of the English Parliament, to which I have already once referred. That committee said in its report, dated April 30, 1891, that whisky—

“may be diluted with a certain quantity of water without ceasing to be whisky, and it may be diluted with spirits containing a little of the [37] by-products to suit the pocket and palate of customers, and it still goes by the popular name of whisky. Your Committee are unable to restrict the use of the name as long as the spirits added are pure and contain no noxious ingredients.” (p. V of the Report.)

Further, the committee said:

“Your committee do not recommend any increased restrictions on blending spirits. The trade has now assumed large proportions, and it is the object of blending to meet the tastes and wants of the public both in regard to quality and price. The addition of patent still spirit, even when it contains a very small amount of by-products, may be viewed rather as a dilution than an adulteration, and, as in the case of the addition of water, is a legal act within the limits of strength regulating the sale of spirits.” (p. VII of the Report.)

The last of the questions put to me is whether the name whisky has different scope according to the fact whether the article called whisky is used as a drug or as a beverage; and I have answered that it has not. No foundation for giving different significance to the name in the two cases exists in actual public usage. What is whisky for drinking is equally whisky as a medicine, so far as the popular acceptance of the name can determine. It has been suggested, however, that the pure-food act makes the drug called whisky different from what public usage considers the beverage whisky, because section 6 of that act declares that “the term ‘drug’ as used in this act [38] shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use;” and section 7 of that act provides that a drug shall be deemed adulterated—

“if when a drug is sold under or by a name recognized in the United States Pharmacopœia or National Formulary it differs from the standard of strength, quality, or purity as determined by the test laid down in the United States Pharmacopœia or National Formulary official at the time of investigation: *Provided*, That no drug defined in the United States Pharmacopœia or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality, or purity be plainly stated upon the bottle, box or other container thereof although the standard may differ from that determined by the test laid down in the United States Pharmacopœia or National Formulary.”

The argument seems to be that under these provisions of the pure-food act whatever is described in the Pharmacopœia as whisky must be entitled to the name “whisky,” and that the description of whisky in the Pharmacopœia differs from that which I have found to result from public usage. I am unable to see, however, that the pharmacopœiac definition of whisky is other than I have given. The Pharmacopœia’s definition has already been quoted, and I have stated my view that such definition, beside insisting upon the grain origin of whisky, demands [39] both because of such origin and also because of its requirement that whisky have “a distinctive odor and taste,” that a substantial amount of the by-products of the distillation of grain, giving distinctive flavor and other properties, be present in whisky. The particular requirements which the Pharmacopœia makes, after giving its definition—such as that “whisky should be at least four years old,” and that its specific gravity, acidity and other particular qualities satisfy special tests—do not seem to be parts of the definition, but are rather points of distinction between superior and inferior whisky. They do not obliterate the fundamental requisites of whisky, as given in the definition itself. Further, it is to be noted that if an article conforms to the definition of whisky given in the Pharmacopœia but does not satisfy the tests of excellence prescribed by the Pharmacopœia, that article may still be sold as whisky without being deemed adulterated under section 7 of the pure food act if “the standard of strength, quality, or purity be plainly stated upon the bottle, box, or other container thereof.” The proviso of section 7, as quoted above, expressly so declares.

Very respectfully,

LLOYD W. BOWERS,
Solicitor General.

WHAT IS THE MEANING OF THE TERM "WHISKY" UNDER THE PURE FOOD ACT, AND THE PROPER REGULATIONS FOR BRANDING VARIOUS KINDS OF WHISKY UNDER THE INTERNAL REVENUE ACT?¹

[Decision by President Taft.]

By the pure-food act of June 30, 1906, Congress forbade the introduction into interstate and foreign commerce of adulterated or misbranded drugs or articles of food, with two objects, one to preserve the health of the people, and the other to prevent their being deceived by label or brand as to the real character of drugs or articles of food offered for sale. Within the definitions of the act potable liquors are articles of food. An important controversy has arisen in the execution and the application of the act as to whether the branding of certain potable liquors with the name "whisky" is a misbranding within the act. All distilled spirits pay, under the internal-revenue laws, a heavy tax. The tax is measured by a certain rate per proof gallon. Theoretically pure ethyl alcohol is 200° proof. A proof gallon of distilled spirits is half water and half alcohol, or a gallon of 100° proof. Potable strength varies from 90° to 102° or 103°. Distilled spirits are manufactured under the close supervision of revenue officers and the brands which are placed upon the packages containing the spirits after manufacture are placed there under regulations of the Internal Revenue Bureau. It is, of course, of the highest importance that the internal-revenue law and the pure-food law should be enforced in such a way as to accomplish the purposes of both.

In Internal Revenue Order No. 723 (April, 1907) directions were given as to how certain distilled spirits should be branded. The effect of this order was to deny the right to the use of the brand "whisky" to any distilled liquor except that which is known to the trade as "straight whisky" and to require the branding of several kinds of liquors distilled from grain as "imitation whisky." The pure-food act does not mention the term "whisky"; it does not authorize any officers to fix a standard in respect to any article of food or liquor. It therefore leaves the question of what liquor may be properly branded as whisky to those who have to execute the pure-food law and the internal-revenue law, subject, of course, to a review of the correctness of their action by courts whenever a case between parties litigant, properly within the jurisdiction of such courts shall arise. Attorney General Bonaparte was asked to pass upon the question of what properly might be included under the brand of whisky within the pure-food law, and rendered two decisions in which he in effect limited the proper use of the brand to what is known in the trade as "straight" whisky. So far as appears from Mr. Bonaparte's opinions, he accepted a definition of whisky from a dictionary or encyclopedia, and, in forming and expressing his opinion, he had not the benefit of any evidence as to the meaning or scope of the term acquired from manufacturers, dealers, or consumers in the trade. Internal Revenue Order 723 was founded on Mr. Bonaparte's opinions.

A petition was filed in April last by a large number of distillers whose interests were affected, asking that the issues passed upon by Mr. Bonaparte and confirmed by Mr. Roosevelt in Internal Revenue Order No. 723 be reheard on the ground that the meaning of the term "whisky" is one of fact, and is to be properly determined only after consideration of competent evidence drawn from those familiar with the trade in which liquors are manufactured and sold. The rehearing was granted, and the matter was referred to Hon. Lloyd Bowers, Solicitor General, to determine upon evidence to be submitted by all parties in interest:

1. What was the article called "whisky" as known (1) to the manufacturers, (2) to the trade, and (3) to the consumers at and prior to the date of the passage of the pure-food law?

2. What did the term "whisky" include?

3. Was there included in the term "whisky" any maximum or minimum of congeneric substances as necessary in order that distilled spirits should be properly designated "whisky"?

4. Was there any abuse in the application of the term "whisky" to articles not properly falling within the definition of that term at and prior to the passage of the pure-food law, which it was the intention of Congress to correct by the provisions of that act?

¹ See F. I. D. 45, 65, 95, 98, 113, 118, and 127, pp. 36, 51, 110, 113, 129, 133, and 139, *ante*; also Opinions of the Attorneys General, pp. 775, 783, and 797, *ante*; and Report of the Solicitor General, p. 818, *ante*.

5. Is the term "whisky" as a drug applicable to a different product than whisky as a beverage? If so, in what particulars?

A very full hearing was had before the Solicitor General and a large amount of evidence was taken, making a record of more than 1,200 printed pages. The answers of the Solicitor General to the questions were detailed and exact. I shall not set them out. It is sufficient to say that he found from the evidence that whisky, as a term of the trade for many years, included much more than "straight" whisky; that it included "rectified" whisky, "redistilled" whisky, and all distillates of grain reduced by water to potable strength and containing a sufficient trace of fusel oil or the congeneric substances accompanying grain distillation to give a distinctive whisky flavor to the liquor; and this whether or not colored by burnt sugar or other harmless flavoring and coloring matter. But he excluded from the proper meaning and scope of the term "whisky" that product of continuous distillation called "neutral spirits," though reduced to potable strength and colored and flavored by burnt sugar, on the ground that in such product there was not enough of the fusel oil or congeneric substances to give to the liquor the distinctive flavor of whisky. He found further that the mixture of neutral spirits with whisky, if a sufficient quantity of fusel oil or congeneric substances remained to retain the whisky flavor, was not an adulteration and did not make it other than whisky.

Exceptions were taken by all parties to these findings of the Solicitor General, and the whole record of the evidence has been brought before me for consideration and decision. I invited the Attorney General and the Secretary of Agriculture to sit with me and hear the arguments. Because of the importance of the case, I have thought it necessary to read with care the entire evidence adduced. The Solicitor General has rendered an opinion to justify his findings of great ability and acumen; and I reach a somewhat different conclusion from him with much reluctance. But I am led to do so by a very clear conviction as to what the evidence shows.

Whisky for more than one hundred years has been the most general and comprehensive term applied to liquor distilled from grain. It is derived from the Irish word "Usquebaugh," and for more than a century has been used in Ireland, Scotland, England, and in this country to mean ardent spirits distilled from grain reduced to potable strength. Its flavor and color have varied with the changes in the process of its manufacture in the United States, Ireland, Scotland, and England, and have been varied by the introduction into it of fruit juice and burnt sugar and other substances. It was manufactured originally in what was called a "pot still" by the distillation of wort or beer fermented from grain. It was composed of about equal parts of water and ethyl alcohol and certain substances now called congeneric substances which united were known as fusel oil; and when the distillate was first produced the so-called fusel oil gave to the liquor a very disagreeable odor and a very raw taste. The efforts of those engaged in the manufacture were directed toward the reduction of the amount of fusel oil in the product and toward the elimination of the disagreeable odor and taste produced by it. This was effected for a great many years by passing the distilled spirit through leaching tubs of charcoal, which tended to purify it and reduce the amount of fusel oil, and subsequently rectification was followed by another step—i. e., redistillation—and at all times by the introduction of fruit essences or burnt sugar. Burnt sugar is used in Scotch whisky as well as in American whisky, though not to the same extent or in the same proportion. Between 1850 and 1860 in this country a very large and profitable business began in certain well-known brands of whisky, which were purified by leaching tubs and were colored and flavored by the use of caramel or burnt sugar. Though there was some American white whisky, the conventional amber or brown color and whisky flavor in America was that produced by a mixture of the raw whisky with its fusel oil reduced as much as possible, and of burnt sugar or caramel.

Some time during the Civil War, it was discovered that if raw whisky as it came from the still, unrectified and without redistillation, and thus containing from one-half to one-sixth of 1 per cent of fusel oil, was kept in oak barrels, the inside of the staves of which were charred, the tannic acid of the charred oak which found its way from the wood into the distilled spirits would color the raw white whisky to the conventional color of American whisky, and after some years would eliminate altogether the raw taste and the bad odor given the liquor by the fusel oil and would leave a smooth, delicate aroma, making the whisky exceedingly palatable without the use of any additional flavoring or coloring. The whisky thus made by one distillation and by ageing in charred

oak barrels came to be known as "straight" whisky, and to those who were good judges came to be regarded as the best and purest whisky.

Meantime the other and shorter method of making whisky grew greatly in its use, and the amount of distilled spirits made from grain either by rectifying or by redistilling, which were reduced to potable strength and given a conventional flavor of whisky by the use of burnt sugar and other essences, far exceeded that of the so-called "straight whiskies;" and as according to this method a potable, pleasant beverage could be made in a short time without the ageing in wood and without the loss of interest on the capital involved in holding the product for two or three years while it acquired color and flavor, it could be sold, of course, much cheaper. It was made originally by distilling a product at a proof of from 140° to 160°, called "high wines", by taking these high wines to a rectifying house and there passing them through leaching tubs to reduce as far as possible the fusel oil, and then coloring and flavoring the whisky with burnt sugar; or by another step of purification, which was a redistillation of the high wines, reducing the fusel oil still further, and then the coloring and flavoring by caramel. The product of this system was known as "finished whisky;" whereas the raw spirits delivered were known as "high wines."

Subsequently, about 1872 or a little later, a patent still came into use by which it was possible through one process of continuous distillation to clarify the spirits somewhat more completely of the fusel oil than the old system of rectifying by leaching tubs, or even by redistillation as a separate step; and the result of this continuous distillation was the production of what was known, and is known now, as "neutral spirits" at a proof varying from 160° to 188°. They still had a small trace of the congeneric substances that go to make up what is known as "fusel oil," but not enough substantially to affect the flavor. The rectifiers, who pay a tax as such under the internal-revenue law, then began to use neutral spirits as they had used high wines before, to color them with burnt sugar, and to offer them as whisky. The difference between whisky made from high wines and the whisky made from neutral spirits was the difference in the traces of fusel oil, being less in the latter than in the former, but, so far as I am able to determine from the evidence, there was only a difference in slight degree. The importance of the fusel oil in the product ready for the drinker can be judged by the fact that it varies in straight whisky from one-half of 1 per cent to one-sixth of 1 per cent, but that in rectified and redistilled whisky it is considerably less, and in the presence of burnt sugar it can hardly be perceptible to the taste.

All these products—straight whisky, rectified spirits whisky, redistilled spirits whisky, and neutral spirits whisky—when reduced by water to a hundred proof or less and sold upon the market as beverages were known to the trade and to the customers as "whiskies;" the difference between straight whisky and the neutral spirits whisky, which now constitutes and for thirty years last passed has constituted, perhaps 75 per cent of all the whisky sold, was well understood, and the difference between the two was seen in the difference in price which each commanded in the market.

It was supposed for a long time that by the ageing of straight whisky in the charred wood a chemical change took place which rid the liquor of fusel oil and thus destroyed the unpleasant taste and odor. It now appears by chemical analysis that this is untrue; that the effect of the ageing is only to dissipate the odor, and to modify the raw, unpleasant flavor, but to leave the fusel oil still in the straight whisky. Fusel oil is known to be poisonous and injurious. In the small quantity in the straight whisky it probably does no harm. But however this may be, it is certain that in the whisky made of neutral spirits there is less fusel oil and less of the poison arising therefrom than there is in the straight whisky. The question, therefore, is not here one of health. It is only one of correct branding to prevent deceit of the public as to what it is buying.

After an examination of all the evidence it seems to me overwhelmingly established that for a hundred years the term "whisky" in the trade and among the customers has included all potable liquor distilled from grain; that the straight whisky is, as compared with the whisky made by rectification or redistillation and flavoring and coloring matter, a subsequent improvement, and that therefore it is a perversion of the pure-food act to attempt now to limit the meaning of the term "whisky" to that which modern manufacture and taste have made the most desirable variety.

Exactly the same question has arisen in England and has been determined by a Royal Commission of eminent lawyers and scientific men in the same way. That commission held, after a full investigation, that neutral, or velvet spirits as they are there more frequently called, made by a patent still from grain was whisky when reduced to potable strength. The same conclusion is shown to have been in the mind of Congress in 1882 when a question arose in the House of Representatives, as between the method of taxation of straight whisky and of that liquor which was the product of continuous distillation. Both were denominated whisky in the discussion. Congress legislated with reference to the distinction between the two in the method of manufacture and preparation for use as a beverage, which was admitted on all sides to exist, but no question was made as to the proper application of the term "whisky" to both kinds of liquor.

With deference to the very able consideration of this question made by Doctor Wiley and other distinguished chemists, I think the fundamental error in all conclusions differing from this is one of fact as to what the name of whisky actually has included for the last hundred years; and while Mr. Bowers, the Solicitor General, greatly enlarged in his definition the character and scope of the term "whisky" beyond theirs, he fell into what seems to me to be the error of making too nice a distinction in reference to the amount of congeneric substances or traces of fusel oil required to constitute whisky for practical purposes when the flavor and color of all whiskies but straight whiskies, have been chiefly that of ethyl alcohol and burnt sugar. If high wines at from 140° to 160° when reduced to potable strength and containing a very small quantity of fusel oil and flavored by burnt sugar are whisky, as he has found, then the mere improvement in the process by continuous distillation so as to give a product of from 160° to 188° proof and still further to reduce its fusel oil, is to not change its whole nature or to make what was genuine "whisky" "imitation whisky" because of a slightly reduced trace of one ingredient. The distinction is too impracticable, in my judgment, for the execution of the law. It may be that the public were not fully or exactly advised as to the change in the process when it was made, but the change in the process was slight and effected economy in the production rather than the flavor of the product; and if the public detected no difference in flavor in the product of the improved process, as they did not, but continued for forty years to regard it as the same, there was no deceit in continuing to call whisky that which was thus merely improved in its manufacture without substantial change of composition or flavor.

It is undoubtedly true that the liquor trade has been disgracefully full of frauds upon the public by false labels; but these frauds did not consist in palming off something which was not whisky as whisky, but in palming one kind of whisky as another and better kind of whisky. Whisky made of rectified or redistilled or neutral spirits and given a color and flavor by burnt sugar, made in a few days, was often branded as Bourbon or Rye straight whisky. The way to remedy this evil is not to attempt to change the meaning and scope of the term "whisky" accorded to it for one hundred years, and narrow it to include only straight whisky; and there is nothing in the pure-food law that warrants the inference of such an intention by Congress. The way to do it is to require a branding in connection with the use of the term "whisky" which will indicate just what kind of whisky the package contains. Thus, straight whiskies may be branded as such and may be accompanied by the legend "aged in wood." Whisky made from rectified, redistilled, or neutral spirits may be branded as whisky made from rectified, redistilled, or neutral spirits, as the case may be.

With this result, the question arises what ought the order to be so that the purpose of the pure-food law can be carried out. The term "straight whisky" is well understood in the trade and well understood by consumers. There is no reason, therefore, why those who make straight whisky may not have the brand upon their barrels of straight whisky, with further descriptive terms as "Bourbon" or "Rye" whisky, as the composition of the grain used may justify, and they may properly add, if they choose, that it is aged in wood.

Those who make whisky of "rectified," "redistilled," or "neutral" spirits can not complain if, in order to prevent further frauds, they are required to use a brand which shall show exactly the kind of whisky they are selling. For that reason it seems to me fair to require them to brand their product as "whisky made from rectified spirits," or "whisky made from redistilled spirits," or "whisky made from neutral spirits," as the case may be; and if aged

in the wood, as sometimes is the case with this class of whiskies, they may add this fact.

A great deal of the liquor sold is a mixture of straight whisky with whisky made from neutral spirits. Now, the question is whether this ought to be regarded as a compound or a blend. The pure-food law provides that "in the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends," the term "blend" shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only. It seems to me that straight whisky and whisky made from neutral spirits, each with more than ninety-nine and one-half per cent ethyl alcohol and water, and with less than half of one per cent of fusel oil, are clearly a mixture of like substances, and that while the latter may have and often does have burnt sugar or caramel to flavor and color it, such coloring and flavoring ingredients may be regarded as for flavoring and coloring only, because the use of burnt sugar to color and flavor spirits as whisky is much older than the coloring and flavoring by the tannin of the charred bark. Therefore where straight whisky and whisky made from neutral spirits are mixed, it is proper to call them a blend of straight whisky and whisky made from neutral spirits. This is also in accord with the decision of the British Royal Commission in the case which I have cited upon a similar issue.

Canadian Club whisky is a blend of whisky made from neutral spirits and of straight whisky aged in the wood, and its owners and vendors are entitled to brand it as such.

Neutral spirits made from molasses and reduced to potable strength has sometimes been called whisky, but not for a sufficient length of time or under circumstances justifying the conclusion that it is a proper trade name. The distillate from molasses used for drinking has commonly been known as rum. The use of whisky for it is a misbranding.

There are other kinds of liquor in respect to which a decision is invoked, but it is thought that the principles above stated, and the directions above given in specific cases, will furnish a clear precedent for all other cases.

By such an order as this decision indicates the public will be made to know exactly the kind of whisky they buy and drink. If they desire straight whisky, then they can secure it by purchasing what is branded "straight whisky." If they are willing to drink whisky made of neutral spirits, then they can buy it under a brand showing it; and if they are content with a blend of flavors made by the mixture of straight whisky and whisky made of neutral spirits, the brand of the blend upon the package will enable them to buy and drink that which they desire. This was the intent of the act. It injures no man's lawful business, because it only insists upon the statement of the truth in the label. If those who manufacture whisky made of neutral spirits, and wish to call it "whisky" without explanatory phrase, complain because the addition of "neutral spirits" in the label takes away some of their trade, they are without a just ground, because they lose their trade merely from a statement of the fact. The straight-whisky men are relieved from all future attempt to pass off neutral-spirits whisky as straight whisky. More than this, if straight whisky or any other kind of whisky is aged in the wood, the fact may be branded on the package, and this claim to public favor may truthfully be put forth. Thus the purpose of the pure-food law is fully accomplished in respect of misbranding and truthful branding.

This opinion will be certified to the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor to prepare the regulation in accordance herewith, under the pure-food law; and to the Secretary of the Treasury and the Commissioner of Internal Revenue to prepare the proper regulation under the Internal Revenue Law.

WM. H. TAFT.

THE WHITE HOUSE, December 27, 1909.

WEEKS v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit, June 18, 1914.)

Office of the Solicitor, Circular No. 81.

The fourth amendment to the Constitution of the United States, which provides that "no warrants shall issue but upon probable cause, supported by oath or affirmation," held not to require an information filed by a United States attorney alleging violation of the Federal Food and Drugs Act to be supported by the oath or affirmation of any person having knowledge of facts showing probable cause for the prosecution, where the defendant voluntarily appeared and answered the allegations of the information, and no warrant of arrest was issued on said information.

Evidence held sufficient to warrant the trial court in submitting to the jury the question of fact as to whether an article labeled: "Creamthick * * *. It is guaranteed to contain no gelatine, gum arabic, egg albumen, or similar article," was misbranded because it contained Indian gum, which was alleged to be a "similar article" to gum arabic.

In Error to the District Court of the United States for the Southern District of New York. Affirmed.¹

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, *Circuit Judge*. The defendant has been convicted of a crime committed in violation of the Pure Food and Drugs Act, approved June 30, 1906. The information charged the defendant with having shipped from New [2] York City to St. Louis, Mo., a certain article of food, labeled in part as follows:

"Creamthick—Serial No. 2049—Manufactured by O. J. Weeks & Co., New York, New York. It is guaranteed to contain no gelatine, gum arabic, egg albumen or similar article."

This label, it was charged, was false and misleading and calculated to mislead and deceive purchasers in that the article of food contained as one of its ingredients an article similar to gum arabic, to wit, Indian gum. The information was signed by the United States attorney, but was not verified, nor were any affidavits filed or submitted to the court. The defendant appeared and demurred to the information, and in specification of points under his demurrer alleged "that the said information is not supported by a verification or oath showing personal knowledge or probable cause." His demurrer was overruled, and being required to plead he pleaded not guilty. At the close of the trial his counsel renewed his motion that the information be dismissed for reasons before stated, but his motion was denied and the case was submitted to the jury and a verdict of guilty was rendered.

The question we have to decide, therefore, is whether an attorney for the United States can proceed in the courts of the United States by information to prosecute one who is alleged to have committed a misdemeanor, where the information is not verified or supported by an affidavit showing personal knowledge or probable cause.

There can be no conviction or punishment for a crime without a formal and sufficient accusation. A court can acquire no jurisdiction to try a person for a criminal offense unless he has been charged with the commission of the particular offense and charged in the particular form and mode required by law. If that is wanting his trial and conviction is a nullity, for no person can be deprived of either life, liberty, or property without due process of law. The forms or modes of accusation which the law recognizes are: Indictment or presentment by a grand jury, and information by the public prosecutor.

The colonists who came to this country from England brought with them the common and statute laws of England as they existed at the time of their emigration and in so far as they were applicable to the local circumstances of the colonies which they established. Among the principles of the common law which they brought were those which regulated the mode of proceeding in criminal cases—the law relating to indictments and informations and the right to trial by jury—although in the colonies as well as in England various statutes had abolished, prior to the Declaration of Independence, a number of the oppressive provisions of English law relating to criminal trials. Among the principles which had thus been abrogated, [3] for example, was that which denied to a person accused of a capital crime the right to have compulsory process for his witnesses and that which withheld from him the right to examine on oath those witnesses who voluntarily appeared for him, as well as that which forbade him the aid of counsel in his defense, except only as regarded questions of law. (See *United States v. Reid*, 12 How., 360, 363 (1851).)

The proceeding by information is said to have been unpopular in England and to some extent in the colonies. But it has never been abolished in England, although in some of our States it has been abolished. At the time of the Declaration of Independence it was a familiar mode of criminal procedure in all the colonies.

When the statute of 3 Henry VII extended the jurisdiction of the court of star chamber and informations became restricted in practice to that court, the members

¹ Affirming *United States v. Weeks*, p. 643, *ante*.

of which were the sole judges of the law, the fact and the penalty, Blackstone (4 Commentaries, 310) states that a very oppressive use was made of them for something more than a century, "so as continually to harass the subject and shamefully enrich the Crown." And when the court of star chamber was abolished in the time of Charles I and proceedings by information were again used in the court of King's bench, the prejudice which had arisen from the long abuse of this process was so strong that it was strenuously contended that all proceedings by information were illegal as being contrary to the nature of English laws and to Magna Charta. But the objections were overruled, Sir Matthew Hale saying:

"That although in all criminal cases the most regular and safe way, and most consonant to the statute of Magna Charta, is by presentation or indictment of 12 sworn men, yet, for crimes inferior to capital ones, proceedings might be by information, and this from long and frequent practice was certainly established as the law of the land." (5 Mod., 463; Show., 106; Bacon's Ab. Information, A; 2 Hawk., P. C. 260; 4 Black. Com., 130; 1 Ersk. Speeches, 275; *State v. Dover*, 9 N. H., 468 (1838).)

And the unpopularity of informations was not restricted to the mother country, but, as we have already said, existed to some extent in this country. Mr. Justice Wilson, of the Supreme Court of the United States, and who was also a member of the Constitutional Convention of 1787, in the lectures which he delivered as professor of law in the University of Pennsylvania in 1790-1792, after calling attention to the two kinds of informations—those filed ex officio by the public prosecutor and those carried on in the name of the Commonwealth or Crown, but in fact at the instance of some private person or common informer—said:

"The first have been the source of much; the second have been the source of intolerable vexation; both were the ready tools by using which Empson and Dudley, and an arbitrary star chamber, fashioned the proceedings of the law into a thousand tyrannical forms. Neither, indeed, extended to capital crimes; but ingenious tyranny can torture in a thousand shapes without depriving the person tortured of his life."

[4] After calling attention to the fact that in England restraints had been imposed upon informations at the instance of private persons but not upon those filed ex officio by the public prosecutor, he went on to say:

"By the constitution of Pennsylvania, both kinds are effectually removed. By that constitution; however, informations are still suffered to live; but they are bound and gagged. They are confined to official misdemeanors; and even against those they can not be slipped but by leave of the court. By that constitution, 'no person shall for any indictable offense, be proceeded against criminally by information'—'unless by leave of the court, for oppression and misdemeanor in office.' " (2 Wilson's Works, Andrews ed., p. 450.)

There seems to be no doubt that prosecution by information is as ancient as the common law itself. The subject had no reason to complain because this method of prosecution was adopted, for as Blackstone (4 Commentaries, p. 310) states:

"The same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, the same judgment was given by the same judges, as if the prosecution had been by indictment."

Moreover, it seems to have always been the rule that the substantial parts of the information had to be drawn with as much exactitude as the corresponding parts of an indictment for the same offense.

In the early years of the Federal Government informations were principally used, if not exclusively used, for the recovery of fines and forfeitures. And Mr. Justice Story, in his Commentaries on the Constitution, section 1780, and written in 1833, said, in speaking of informations:

"This process is rarely resorted to in America; and it has never yet been formally put into operation by any positive authority of Congress under the National Government, in mere cases of misdemeanors; though common enough in civil prosecutions for penalties and forfeitures."

But within the last 50 years prosecutions by informations have increased greatly in the Federal courts. (See ex parte Wilson, 114 U. S., 417, 425.)

It appears, as Stephens states in his History of the Criminal Law, volume 1, page 295, that from the earliest times the law officers of the King accused persons of offenses not capital in his own court without the intervention of a grand jury. But the right to prefer a criminal information is at common law restricted to misdemeanors. At common law any information will lie for any misdemeanor, but not for a felony." (22 Cyc., 187, and cases there cited.)

The offense charged in the information now under consideration was plainly a misdemeanor, and for more than 200 years the right has been established in England to prosecute by information and without the sanction of a grand jury a person charged with having committed a misdemeanor.

[5] Bacon in his *Abridgement*, volume 3, page 635, after stating that an information differs principally from an indictment in that "an indictment is an accusation founded by the oath of 12 men, whereas an information is only the allegation of the officer who exhibits it," goes on to explain that there were two kinds of criminal informations in use in England under the common law procedure. The first, which was for offenses more immediately against the King, was filed, he says, by the attorney general, ex officio, and without leave of court. The second, which was for offenses against private individuals, was exhibited by masters of the Crown, and, as matter of course, prior to the statute of 4 and 5 William and Mary, c. 18. But after that statute was enacted informations of the second class, he declares, could not be filed except upon leave of court, and all such informations had to be supported by the affidavit of the person at whose suit it was filed.

In the United States it has been suggested that informations brought by the prosecuting officers answer to the informations filed by the masters of the Crown and which, as said, had to be supported by affidavit and not to the informations of the first class or those which related more immediately to the King and which could be filed without affidavit. Those who make this suggestion rely upon the statement found in Blackstone's *Commentaries*, volume 4, page 309, where that distinguished commentator says:

"The objects of the King's own prosecutions, filed ex officio by his own attorney general, are properly such enormous misdemeanors as peculiarly tend to disturb or endanger his Government, or to molest or affront him in the regular discharge of his royal functions. For offenses so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the Crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal; which power, thus necessary, not only to the ease and safety, but even to the very existence of the executive magistrate, was originally reserved in the great plan of the English constitution, wherein provision is wisely made for the due preservation of all its parts. The objects of the other species of informations filed by the master of the Crown office upon the complaint or relation of a private subject, are any gross and notorious misdemeanors, riots, batteries, libels, and other immoralities of an atrocious kind, not peculiarly tending to disturb the Government (for those are left to the care of the attorney general), but which, on account of their magnitude or pernicious example, deserve the most public animadversion."

Now, this statement may seem to imply that the attorney general's right to file informations for misdemeanors was not unlimited, but was restricted to misdemeanors which tended to disturb or endanger the Government. But if this was his meaning it is evident that he was mistaken in his understanding of the law. Chitty in his great work on the *Criminal Law*, page 384, says:

"Informations may be filed by the attorney general for any offense below the dignity of felony, which tends, in his opinion, to disturb the Government or immediately interfere with the interests of the public or the safety of the Crown. He most frequently [6] exercises this power in cases of libels on Governments or high officers of the Crown, etc. He seems, indeed, at his option to exact it when any offense occurs which may thus be prosecuted in the Crown office. He may file an information against any one whom he thinks proper to select, without oath, without motion or opportunity for the defendant to show cause against the proceeding."

And Cole, in his work on *Criminal Informations*, page 9, says that—
"The attorney general may exhibit an ex officio information for any misdemeanor whatever."

And Hawkins, in his *Pleas of the Crown*, volume 2, page 369, says:

"As to the first of these particulars, viz: In what cases such informations lie, it hath been holden, that the King shall put no one to answer for a wrong done principally to another, without an indictment or presentment, but that he may do it for a wrong done principally to himself. But I do not find this distinction confirmed by experience; for it is everyday's practice, agreeable to numberless precedents, to proceed by way of information, either in the name of the attorney general or of the master of the Crown office, for offenses of the former kind, as for batteries, cheats, seducing a young man or woman from their parents in order to marry them against their consent, or for any other wicked purpose; spiriting away a child to the plantations, rescuing persons from legal arrests, perjuries and subornations thereof, forgeries, conspiracies, whether to accuse an innocent person or to impoverish a certain set of lawful traders * * * and other such like crimes done principally to a private person, as well as for offenses done principally to the King."

In Clark on *Criminal Procedure*, pages 128 and 129, it is said:

"By an early English statute (4 and 5 William and Mary, c. 18), however, which is old enough to have become a part of our common law, if applicable to our conditions,

it was provided that informations by masters of the Crown office could only be filed by leave of court and that they should be supported by the affidavit of the person at whose suit they were preferred. The law remained that informations filed by the attorney general (and as already stated he could file them for any misdemeanor) need not be verified and that he was the sole judge of the necessity or propriety of filing them. * * * There is some authority for the proposition that the kind of information to be used at common law in this country is that which in England was filed by the masters of the Crown office. * * * But by the better opinion, the other kind of information is the one in use with us."

In Bishop's Criminal Procedure, section 144. it is said:

"In our States the criminal information should be deemed to be such, and such only, as in England is presented by the attorney or solicitor general. This part of the English common law has plainly become common law with us. As with us, the powers which in England were exercised by the attorney or solicitor general are largely distributed among our district attorneys, whose office does not exist in England, the latter officers would seem to be entitled, under our common law, to prosecute by information, as a right adhering to their office and without leave of court."

If it is true, and it seems to be, that the district attorneys exercise the powers which in England were exercised by the attorney or solicitor general, then they are entitled to proceed upon information, and that without leave of the court and without affidavit.

It is necessary to keep in mind what Mr. Stephen, in his General View of the Criminal Law of England, page 156, calls the "most [7] characteristic principle of the law of England" on the subject of criminal procedure, namely, that in that country "every-one, without exception, has the right to use the Queen's (King's) name for the purpose of prosecuting any person for any crime." The statute (4 and 5 William and Mary, c. 18) was intended to restrict the right of prosecution by private and not public prosecutors. Prior to that act it had been within the power of any individual to file an information without disclosing to the court the grounds upon which it was exhibited. (4 T. R. 290.) And the meaning of the statute was that the clerk of the Crown should thereafter file no information of a private prosecutor without leave of the court, and that the fact that there was probable cause for filing it should be disclosed in order that the court might know whether to grant leave, and it was further intended to preclude the issuance of process on such informations without recognition. (Comyn's Digest, vol. 4, p. 558, note.) But there was no intention to limit the right of the attorney general to prosecute by information as he always has done. It was not necessary in England either before or after the statute that he should obtain leave of the court before filing his information and there was, therefore, not the same reason why he should verify any information which he filed. Moreover, he was acting throughout under his oath of office and it was not assumed that he would proceed upon information without probable cause.

We think that the weight of authority is that in this country, as the text writers assert, the informations used by the prosecuting officers are the informations used by the attorney general in England and not those exhibited by masters of the Crown and which were governed by 4 and 5 William and Mary, c. 18. And as at common law an information could be filed by the attorney general simply on his oath of office and without verification, it has been held in this country that verification of an information by a prosecuting attorney is unnecessary unless required by some constitutional or statutory provision. (Long. v. People, 135 Ill., 435; People v. Graney, 91 Mich., 646; State v. Pohl, 170 Mo., 422, 22 Cyc., 281.)

We pass, therefore, to inquire whether there is anything in the Constitution of the United States or in the acts of Congress which in any way alters the common law respecting the right of the prosecuting officers of the Government of the United States to proceed by information in criminal cases in the Federal courts.

The Constitution of the United States leaves all offenses against the United States open to prosecution by information except those which are capital or infamous. The restriction as to those offenses is contained in the fifth amendment:

"No persons shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger."

[8] The Supreme Court in *ex parte Wilson* (144 U. S., 417 [1885]) authoritatively decided what meaning is to be attached to the word "infamous" in this connection. The court held that a crime punishable by imprisonment for a term of years with hard labor is an infamous crime. In the constitutional sense it is not the character of the crime, but the nature of the punishment which renders the crime infamous. The offense with which the defendant in this case is charged is not an infamous one, but one upon which he might be tried upon information.

The acts of Congress not only have not prohibited the use of informations, but have on the contrary expressly authorized their use in certain cases. (See sec. 1022 of the Revised Statutes.)

The fourth amendment to the Constitution of the United States provides as follows, "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; no warrant shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

Mr. Justice Story, in his Commentaries on the Constitution, volume 2, section 1902, in speaking of this amendment, states that:

"It is little more than the affirmance of a great constitutional doctrine of the common law."

If that be true and if it also be true that at common law the Attorney General could file an information without verification or affidavit of probable cause, his oath of office being regarded as sufficient, then this particular amendment should not be regarded as altering the rule upon that subject. In *United States v. Maxwell* (3 Dillon, 257 [1875]), in an opinion written by Judge Dillon, it is said:

"We are of the opinion, therefore, that offenses not capital or infamous may, in the discretion of the court, be prosecuted by information. We can not recognize the right of the district attorney to proceed on his own motion and shall require probable cause of guilt to appear by the oath of some credible person before we will allow an information to be filed and a warrant of arrest to issue. But with these safeguards there is no more reason to fear an oppressive use of information than there is reason to fear an abuse of the powers of a grand jury."

The facts in the case were that prior to the term complaint on oath had been made before a United States commissioner charging the defendant with several violations of the internal-revenue laws, and the defendant was arrested upon a warrant issued by the commissioner and held to answer to the district court. At the term, the district attorney, upon the said complaint, warrant, and recognizance, moved the court for leave to file criminal information against the defendant, charging him with said offenses, which leave was granted and the information accordingly filed. The defendant appeared and pleaded guilty. Afterwards his counsel made a motion in arrest of judgment upon the ground that the defendant could only be punished criminally upon an indictment and not upon an information. The motion in arrest of judgment was overruled, the court using, in the course of its opinion, the language already quoted. The case can not be regarded as holding that an information must be verified. The court, in a dictum, announced that it would not permit an information to be filed and a warrant of arrest to issue without some evidence being presented under oath that probable cause of guilt existed.

In *United States v. Smith* (40 Fed., 755 [1889]), in a case which arose in the Circuit Court for the Eastern District of Virginia, Judge Hughes said:

"A preliminary question raised in the argument was whether the district attorney may, of right, by virtue of his official prerogative, file informations charging citizens with offenses brought officially to his knowledge. This can not be done, under the rules and practice of this court, except upon previous complaint under oath, after opportunity has been given the accused to appear before the examining officer and to confront the witnesses testifying in support of the complaint. This requisite makes it necessary that the district attorney shall have leave from the court to file an information; and, if it is within the discretion of the court to grant the leave or not, then the right to file is not a prerogative of the prosecutor's office, and the court may require him before granting leave to bring the accused, by rule or other proceeding, before the court to show cause, if cause there be, against the filing of the information."

The decision does not hold that an information must be verified.

The case most frequently cited in the Federal courts on this subject is that of *United States v. Tureaud* (20 Fed., 621), decided in 1884 in the fifth circuit by Judge Billings, of the eastern district of Louisiana. It was decided in that case that informations must be based upon affidavits which show probable cause arising from facts within the knowledge of the parties making them. And the court quashed an information which was based on an affidavit which read:

"George A. Dice, being duly sworn, says: All the statements and averments in the foregoing information are true, as he verily believes."

It was conceded—

"that under the usages of the Government of Great Britain this information belongs to the class of formal accusations which could be made by the King in his courts without any evidence and against all evidence."

The opinion then continued:

"But the adoption of the fourth amendment affected all kinds and modes of prosecution for crimes or offenses, for there can be no legal pursuit of accused persons without apprehension. All prosecutions require warrants. An information, a suggestion of a criminal charge to a court, is a vain thing unless it is followed by a *capias*. The procedure by information, therefore, after it was acted upon by this amendment lost its prerogative function or quality. It could not thereafter be the vehicle of preferring any arbitrary accusation—not by Kings—because we have in the department of criminal law no successor to him, so far as he represented a right to institute, [10] if it pleased him, unsupported incriminations, nor by the district attorney, nor any other officer of the United States, for the Constitution has said, in effect, that in no way nor manner shall magistrates or courts issue warrants, except upon proofs, which are to be upon oath and make probable excuse."

What is said as to the necessity for a verification of the information we think is correct in any case where the application for the issuance of a warrant of arrest is based on the information. In the United States *v.* Polite (35 Fed., 58 [1888]) in the district court for the district of South Carolina, it is said that—

"informations must be based upon affidavits which show probable cause arising from facts within the knowledge of the parties making them, and that mere belief is not sufficient."

In this case the information was not sworn to, but accompanying it were the papers of the commissioner who held the preliminary examination, including the sworn testimony of the witnesses taken in the presence of the accused. It was held that this was sufficient, and a motion to quash was refused.

In Johnston *v.* United States (87 Fed., 187 [1898]) in the Circuit Court of Appeals for the Fifth Circuit the two preceding cases are referred to and approved. The information was not sworn to but was accompanied by an affidavit. The court said:

"The affidavit on which the information was based was wholly insufficient to warrant the arrest and trial of the plaintiff in error and is altogether too general in terms as to the offense against the United States said to have been committed; and it shows no knowledge, information, nor even belief on the part of the affiant as to the guilt of the party charged, beyond the bare statement that 'there is probable cause to believe that the said offense has been committed by P. T. Johnston.' However false the affidavit may be it would be next to impossible to assign and prove perjury upon it."

In the United States *v.* Baumert (179 Fed., 735, 742 [1910]) District Judge Ray in a carefully prepared opinion said:

"Under the common law the information was not necessarily verified; but, as stated, this led to abuses and the adoption of the fourth amendment to the Constitution, which in legal effect demands that no warrant shall issue upon an information filed by the United States attorney, unless it states facts, a crime, etc., and is supported by the oath of the officer filing it, who must speak from personal knowledge or by the oaths or affirmations of others who speak from personal knowledge."

There is nothing in the opinion rendered which holds that an information must in all cases be verified or supported by an affidavit showing probable cause. But only that an information must be so verified or supported when an application for the issuance of a warrant is based on it. The sole question before the court was as to the issuance of a warrant, and the court declined to direct its issuance on an information made on the information and belief of the district attorney alone.

In United States *v.* Morgan (222 U. S., 274, 282 [1911]) the Supreme Court in the case of one prosecuted for a violation of the Pure Food and Drugs Act said:

[11] "A further answer is that as to this and every other offense the fourth amendment furnishes the citizen the nearest practicable safeguard against malicious accusation. He can not be tried on an information unless it is supported by the oath of some one having knowledge of facts showing the existence of probable cause. Nor can an indictment be found until after an examination of witnesses, under oath, by grand jurors, the chosen instruments of the law to protect the citizen against unfounded prosecutions, whether they be instituted by the Government or prompted by private malice."

This statement as to the necessity of the information being supported by the oath of some one having knowledge of facts showing the existence of probable cause is *obiter dictum*. The court has certainly never decided that under such circumstances as exist in the case now before us no trial could be had.

In Foster's Federal Practice, fifth edition, section 494, page 1659, this usually accurate writer states the rule as follows:

"An information can not be filed without leave of the court. * * * An information must be supported by an affidavit showing probable cause for the prosecution arising from facts within the knowledge of the affiant; or by the depositions of witnesses

taken upon a preliminary examination or affidavits upon which a warrant of arrest against the accused was previously issued, which may be sufficient."

The limitation imposed by this amendment is a limitation solely upon the powers of the Federal Government and not upon the powers of the State governments. This principle of construction was settled as early as 1833 by a decision written by Chief Justice Marshall in the leading case of *Barron v. Baltimore* (7 Peters, 243) and has been adhered to by the Supreme Court in numerous cases which have subsequently arisen. But in the constitutions of some of the States a provision exists similar to that embodied in the fourth amendment. And we may briefly inquire as to the effect given to it, as respects informations, by the decisions of the State courts. They have held in a number of cases that a constitutional provision similar in terms to that embodied in the fourth amendment to the Constitution of the United States is violated if proceedings are had under an information which is not supported by the oath or affirmation of any person. (*Lustig v. People*, 18 Col., 217 [1893]; *State v. Gleason*, 32 Kans., 245 [1884]; *Myers v. People*, 67 Ill., 503 [1873]; *Eichenlaub v. State*, 36 Ohio St., 140 [1880]; *De Graff v. State*, 2 Okl. Cr., 519 [1909]; *Thornberry v. State*, 3 Tex. App., 36 [1877]; *State v. Boulter*, 5 Wyom., 236 [1894].) But the State courts are not agreed in this view, some of them having reached a contrary conclusion. (See *State v. Smith*, 114 La., 322 [1905]; *State v. Guglielmo*, 46 Oregon, 250 [1905]; *Territory v. Cutinola*, 4 N. Mexico, 160 [1887].)

In the case at bar the information was not verified, neither was it supported by any affidavit. The information begins, "Now comes Henry A. Wise, United States attorney for the Southern District of New York, leave having been first had and obtained, and respect [12] fully informs this court that," etc. It does not appear, however, that in obtaining leave of the court to file the information there was ever presented to the court any complaint under oath or any affidavit showing probable cause to believe that the person accused in the information had ever committed the offense charged against him.

If the fourth amendment makes it necessary that under all circumstances an information must be verified or supported by an affidavit showing probable cause, then proceedings had in the prosecution of the defendant can not be sustained. But the right secured to the individual by the fourth amendment, as we understand it, is not a right to have the information by which he is accused of crime verified by the oath of the prosecuting officer of the Government or to have it supported by the affidavit of some third person. His right is to be protected against the issuance of a warrant for his arrest except "upon probable cause supported by oath or affirmation" and naming the person against whom it is to issue. If the application for the warrant is made to the court upon the strength of the information, then the information should be verified or supported by an affidavit showing probable cause to believe that the party against whom it is issued has committed the crime with which he is charged. But if no warrant has issued, no arrest been made, and the person has voluntarily appeared, pleaded to the information, been tried, convicted, and fined, we fail to discover wherein any right secured to him by the fourth amendment has been infringed. The fact that in the case at bar the defendant demurred to the information because it was not verified and he then pleaded not guilty only after his objection to the demurrer was overruled does not affect the matter. There was nothing in the ruling of the court that deprived him of his constitutional right to have no warrant issued for his arrest "but upon probable cause, supported by oath or affirmation." No such warrant has been at any time issued and no application for its issuance has ever been so much as requested.

The Pure Food and Drugs Act makes it a crime against the United States if any part of the label on goods sent in interstate commerce is false and misleading. The goods shipped by the defendant were on the label "guaranteed to contain no gelatine, gum arabic, egg albumen, or similar article." The claim of the Government is that while the goods contained no gum arabic they did contain India gum and that India gum was "similar" to gum arabic. The jury found that this was so after being instructed that if they had a reasonable doubt on the subject they must find for the defendant. There was sufficient evidence to warrant the submission of the case to the jury, and we find no error in the rulings of the court.

Judgment affirmed.

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